INDEPENDENT COUNSEL STATUTE AND INDEPENDENT COUNSEL ACCOUNTABILITY AND REFORM ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.R. 892

INDEPENDENT COUNSEL ACCOUNTABILITY AND REFORM ACT

FEBRUARY 29, 1996

Serial No. 92

Printed for the use of the Committee on the Judiciary

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INDEPENDENT COUNSEL STATUTE AND INDEPENDENT COUNSEL ACCOUNTABILITY AND REFORM ACT

THURSDAY, FEBRUARY 29, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:39 a.m., in room 2141, Rayburn House Office Building, Hon. Bill McCollum (chairman of the subcommittee) presiding.

Present: Representatives Bill McCollum, Steven Schiff, Stephen E. Buyer, Howard Coble, Fred Heineman, Ed Bryant of Tennessee, Steve Chabot, Bob Barr, Charles E. Schumer, Robert C. Scott, Zoe Lofgren, Sheila Jackson Lee, and Melvin L. Watt.

Also present: Representative John Conyers, Jr.

Staff present: Paul J. McNulty, chief counsel; Glenn R. Schmitt, counsel; Audray L. Clement, secretary; and Tom Diaz, minority counsel.

OPENING STATEMENT OF CHAIRMAN McCOLLUM

Mr. MCCOLLUM. This hearing of the Subcommittee on Crime will come to order. Good morning. Our hearing today examines the Independent Counsel Act.

This law was enacted in 1978 in response to Watergate, and the seemingly inability of our own Government to investigate crimes that may have been committed by senior administration officials. When Congress drafted this statute, its basic purpose was to create a process which would restore public confidence in the Government's ability to impartially investigate alleged wrongdoing by Government officials.

Since 1978, there have been 17 independent counsel investigations, four of which are ongoing. During those 18 years, the Government has spent almost $115 million on these investigations. Some of the investigations have produced indictments and convictions, while some have found no criminal laws were broken.

During this period also, Congress has amended the act three times, allowed it to lapse for 2 years, and then reauthorized it again in 1994 for 5 more years. Today we'll consider anew whether this act is still necessary to promote the public's confidence in its Government, and what changes, if any, need to be made to the act.

We'll also examine the bill H.R. 892, which proposes to modify the act. We'll receive testimony from two former independent coun-

sels and from a person who was both the subject of an independent counsel investigation, and who has represented others under investigation.

We will hear from representatives of the General Accounting Office concerning the expenditures of the independent counsels. We'll also hear from a former White House Counsel and Federal judge who voted for the act when he was a Member of Congress and served as Counsel to the President being investigated by an independent counsel.

I hope that today we will explore together such questions as whether time limits and spending limits should be placed on the independent counsel investigations, whether these investigations should remain secret until concluded, and whether the scope of their investigations should be limited. Most importantly, I hope that we will discuss whether the act is still needed now, 20 years after Watergate. Questions about scope of jurisdiction of an independent counsel have become a major issue. We must find the proper balance between limited and efficient investigations by independent counsels and sufficient flexibility to follow evidentiary leads wherever they lead. We cannot have independent counsels bogged down in endless jurisdictional disputes. That does not serve anyone's best interest.

[The bill, H.R. 862, follows:]

104TH CONGRESS
1ST SESSION

H. R. 892

To reauthorize the independent counsel statute, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 10, 1995

Mr. DICKEY (for himself, Mr. SHAYS, Mr. INGLIS of South Carolina, and Mr. BONILLA) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To reauthorize the independent counsel statute, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Independent Counsel Accountability and Reform Act of 1995".

SEC. 2. EXTENSION.

Section 599 of title 28, United States Code, is amended by striking "Reauthorization Act of 1994" and inserting "Accountability and Reform Act of 1995".

SEC. 3. BASIS FOR PRELIMINARY INVESTIGATION.

(a) INITIAL RECEIPT OF INFORMATION.—Section 591 of title 28, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "information" and inserting "specific information from a credible source that is"; and

(B) by striking "may have" and inserting "has";

(2) in subsection (c)(1)—

(A) by striking "information" and inserting "specific information from a credible source that is"; and

(B) by striking "may have" and inserting "has"; and

(3) by amending subsection (d) to read as follows:

"(d) TIME PERIOD FOR DETERMINING NEED FOR PRELIMINARY INVESTIGATION.—The Attorney General shall determine, under subsection (a) or (c) (or section 592(c)(2)), whether grounds to investigate exist not later than 15 days after the information is first received. If within that 15-day period the Attorney General determines that there is insufficient evidence of a violation of Federal criminal law referred to in subsection (a), then the Attorney General shall close the matter. If within that

15-day period the Attorney General determines there is sufficient evidence of such a violation, the Attorney General shall, upon making that determination, commence a preliminary investigation with respect to that information. If the Attorney General is unable to determine, within that 15-day period, whether there is sufficient evidence of such a violation, the Attorney General shall, at the end of that 15-day period, commence a preliminary investigation with respect to that information.".

(b) RECEIPT OF ADDITIONAL INFORMATION.—Section 592(c)(2) of title 28, United States Code, is amended by striking "information" and inserting "specific information from a credible source that is".

SEC. 4. PROSECUTORIAL JURISDICTION OF INDEPENDENT COUNSEL.

(a) PROSECUTORIAL JURISDICTION.—Section 593(b) of title 28, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking "define" and inserting ", with specificity, define"; and

(B) by adding at the end the following: "Such jurisdiction shall be limited to the alleged violations of criminal law with respect to which the Attorney General has requested the appointment of the independent counsel, and

matters directly related to such criminal violations."; and

(2) by amending paragraph (3) to read as follows:

"(3) SCOPE OF PROSECUTORIAL JURISDICTION.—In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the alleged violations of criminal law with respect to which the Attorney General has requested the appointment of the independent counsel, and matters directly related to such criminal violations, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.".

(b) CONFORMING AMENDMENT.—Section 592(d) of title 28, United States Code, is amended by striking "subject matter and all matters related to that subject matter" and inserting "the alleged violations of criminal law with respect to which the application is made, and matters directly related to such criminal violations".

SEC. 5. AUTHORITIES AND DUTIES OF INDEPENDENT COUNSEL.

(a) OFFICE SPACE.—Section 594(l)(3) of title 28, United States Code, is amended to read as follows:

"(3) OFFICE SPACE.—The Administrator of General Services shall promptly provide appropriate office space for each independent counsel. Such office space shall be within a Federal building unless the Administrator of General Services determines that other arrangements would cost less.".

(b) COMPLIANCE WITH POLICIES OF THE DEPARTMENT OF JUSTICE.—

(1) AMENDMENTS.—Section 594(f) of title 28, United States Code, is amended—

(A) by striking ", except where not possible," and inserting "at all times"; and

(B) by striking "enforcement of the criminal laws" and inserting "the enforcement of criminal laws and the release of information relating to criminal proceedings".

(2) PRIOR AMENDMENTS.—The amendments made to section 594(f) of title 28, United States Code, by section 3(e) of the Independent Counsel Reauthorization Act of 1994 are repealed.

(c) LIMITATION ON EXPENDITURES.—Section 594 of title 28, United States Code, as amended by subsection (a) is amended by adding at the end the following:

"(n) LIMITATION ON EXPENDITURES.—No funds may be expended for the operation of any office of inde-

pendent counsel after the end of the 2-year period after its establishment, except to the extent that an appropriations Act enacted after such establishment specifically makes available funds for such office for use after the end of that 2-year period.".

SEC. 6. REMOVAL, TERMINATION, AND PERIODIC REAPPOINTMENT OF INDEPENDENT COUNSEL.

(a) GROUNDS FOR REMOVAL.—Section 596(a)(1) of title 28, United States Code, is amended by adding at the end the following: "Failure of the independent counsel to comply with the established policies of the Department of Justice as required by section 594(f) or to comply with section 594(j) may be grounds for removing that independent counsel from office for good cause under this subsection.".

(b) TERMINATION.—Section 596(b)(2) of title 28, United States Code, is amended to read as follows:

"(2) TERMINATION BY DIVISION OF THE COURT.—The division of the court may terminate an office of independent counsel at any time—

"(A) on its own motion,

"(B) upon the request of the Attorney General, or

"(C) upon the petition of the subject of an investigation conducted by such independent

counsel, if the petition is made more than 2 years after the appointment of such independent counsel,

on the ground that the investigation conducted by the independent counsel has been completed or substantially completed and that it would be appropriate for the Department of Justice to complete such investigation or to conduct any prosecution brought pursuant to such investigation, or on the ground that continuation of the investigation or prosecution conducted by the independent counsel is not in the public interest.".

(c) MONTHLY EXPENDITURES.—

(1) AMENDMENT.—Section 596(c) of title 28, United States Code, is amended by adding at the end the following:

"(3) On or before the end of each month, an independent counsel shall report to the committees listed in paragraph (2)(B) the amount expended in the previous month.".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1), shall take effect at the end of the 1st month beginning after the date of the enactment of this Act.

(d) PERIODIC REAPPOINTMENT.—Section 596 of title 28, United States Code, is amended by adding at the end the following:

"(d) PERIODIC REAPPOINTMENT OF INDEPENDENT COUNSEL.—If an office of independent counsel has not terminated before—

"(1) the date that is 2 years after the original appointment to that office, or

"(2) the end of each succeeding 2-year period,

such counsel shall apply to the division of the court for reappointment. The court shall first determine whether the office of that independent counsel should be terminated under subsection (b)(2). If the court determines that such office will not be terminated under such subsection, the court shall reappoint the applicant if the court determines that such applicant remains the appropriate person to carry out the duties of the office. If not, the court shall appoint some other person whom it considers qualified under the standards set forth in section 593 of this title. If the court has not taken the actions required by this subsection within 90 days after the end of the applicable 2-year period, then that office of independent counsel shall terminate at the end of that 90-day period.".

SEC. 7. GAO REPORT.

The Comptroller General of the United States shall submit to the Congress, not later than 1 year after the date of the enactment of this Act, a report setting forth recommendations of ways to improve controls on costs of offices of independent counsel under chapter 40 of title 28, United States Code.

○

Mr. MCCOLLUM. I look forward to hearing the testimony of our witnesses today, and I welcome each of them. I will now recognize the ranking minority member of the subcommittee, the gentleman of New York, Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman. First, I welcome this hearing, and compliment you once again on another timely and important hearing. Our most solemn duty is to make sure that our laws do not harm innocent people. By its very nature, the independent counsel law has the potential to do both great good and great harm.

If it is wrongly, incompetently or recklessly used, the law can destroy innocent public lives. The appointment of any independent counsel inevitably touches gifted men and women who have dedicated their lives to public service. Every independent counsel has the power to end those public careers and shatter families and destroy reputations.

Having said that, it is certainly true that when corruption is truly found out, that must be the sad, but deserved cost of wrongdoing. In certain limited cases, the independent counsel is the only, the only mechanism free of conflict of interest for determining whether corruption occurred. But no system is perfect and no one is beyond making mistakes, not even an independent counsel. Because of that awesome potential, we have a duty to scrutinize both the independent counsel law and the conduct of the independent counsels themselves.

I favor continuing the independent counsel law. It promises millions of hardworking, ordinary Americans that wrongdoing, even at the highest levels by the most powerful, will be pursued without fear and without favor. Certain changes may be required, but I believe the basic premise of the law and its basic features should remain in place.

But underlying the law is only part of what we must look at, Mr. Chairman. We must examine also closely the conduct of the independent counsels themselves to see whether and how the law ought to be changed. We give these men, as mentioned before, extraordinary power. Power that rivals the power of the Attorney General of the United States, our Nation's highest law enforcement officer.

We give them this power for one reason and one reason only. To make sure that there is no conflict of interest. Indeed, not even the appearance of a conflict of interest in investigating and prosecuting can exist. That is why we have such a law. There is no other reason for the law. We do not take our highest law enforcement powers from the Attorney General and give them to independent counsels because we think independent counsels are smarter investigators or better prosecutors. We take the extraordinary step only, only to prevent conflicts of interest.

That is why recent allegations about one of our current independent counsels, Kenneth Starr, trouble me, and trouble me greatly. A magazine article that was published this morning describes facts that at least on their face raise a question as to whether independent counsel Kenneth Starr had a conflict of interest from the very moment of his appointment. I do not know whether this article in the Nation Magazine is 100 percent accurate. But we ought to find out.

Simply put, it alleges that at the very same time Mr. Starr was using his power to investigate the RTC, his partners at the law firm of Kirkland & Ellis were themselves negotiating with the RTC to settle a serious lawsuit the RTC had brought against the law firm. If that is true, it raises a serious question.

By accepting his appointment, Mr. Starr gains extraordinary power over a Federal agency that had charged his law firm with serious wrongdoing, and was seeking a large civil penalty from it. According to this article a few weeks after Mr. Starr's appointment, his office used the grand jury subpoena power to investigate the RTC and some of the very same RTC employees who were overseeing the litigation against his law firm. Furthermore, unlike his predecessor, Robert Fisk, Mr. Starr did not sever relationship with the law firm.

This allegations raise questions I'd like to see answered. Here are just a few of them. Did Mr. Starr inform the special panel of the court that appointed him of the litigation between Kirkland & Ellis and the RTC while it was considering his appointment? Did Mr. Starr at any time, before or after his appointment as independent counsel, discuss with his partners the litigation between Kirkland & Ellis and the RTC or the settlement negotiations going on between the RTC and Kirkland & Ellis?

When did Mr. Starr inform his ethics counsel, the well-esteemed Samuel Dash, Professor Dash, of the RTC's lawsuit against Kirkland & Ellis? What did he tell Professor Dash? Did Professor Dash render a formal opinion in writing on the matter? What did the opinion say? The article says that there was an opinion given, but it occurred a year later, after this whole incident had occurred.

Has the subject of the litigation between Kirkland & Ellis and the RTC come up in any way, shape or form in the course of Mr. Starr's investigation as independent counsel? And did Mr. Starr's investigation of the RTC in any way influence the professional staff of the RTC and how they handle settlement negotiations with Kirkland & Ellis. Did they among themselves discuss Mr. Starr's role and his relationship to the law firm?

Finally, a policy question we should ask. Is whether there is any way we can change the law to prevent even the appearance of such a conflict from coming up at the same time, and at the same time, attract competent people to these demanding tasks. Should we, and I will ask some of the members of the second panel this question, should we require independent counsels to sever all financial ties with their previous firms while they are independent counsels?

Mr. Chairman, I would ask that this article be put into the record. It may well be that Mr. Starr has a convincing answer for the appearances that this article raises. But in any case, we should get the answers.

In the meantime, Mr. Chairman, I do intend to ask the witnesses their opinion on the general counsel guidelines that must be followed when the independent counsel maintains ongoing business or legal relationships while in office as an independent counsel. This committee might have to seriously consider how we should amend the law to prevent both the reality and any appearance of conflict between the duties of independent counsel and their ties to former practices. Thank you, Mr. Chairman.

Mr. MCCOLLUM. Without objection, the article will be admitted into the record.

[See appendix, p. 144.]

Mr. MCCOLLUM. But I would observe, Mr. Schumer, that while you are within your bounds to raise this issue, the subject of this hearing is not Mr. Starr nor the Nation's article. He is not here to defend himself and we do not have the opportunity to examine or cross-examine the authors of that article today. So I note that simply so everybody puts this hearing in perspective. That's all.

Mr. SCHUMER. If you would yield, your point is well taken except for the policy issue as to what should be the economic and financial relationships of any independent counsel.

Mr. MCCOLLUM. You are certainly within your bounds to raise the policy issue, but Mr. Starr is not here, nor are the accusers.

Does anyone else wish to make an opening statement this morning? Mr. Schiff or anyone else? Very well.

I am very pleased to have today a very special privilege, our chairman of the full Judiciary Committee is a witness before our subcommittee. I have had him as a friend for a long time. I am very pleased to introduce Congressman Henry Hyde. He has represented the Sixth District of Illinois since 1974. He presently serves as chairman of our Judiciary Committee, and is also a member of the Committee on International Relations.

He has been described in the latest addition of the Almanac of American Politics as "one of the most respected and intellectually honorable Members of the House." I might add that I think all of us on this panel would certainly concur in that description.

He is a veteran of World War II, and served in the U.S. Naval Reserve for over 20 years. He is the recipient of numerous honors, awards, and honorary degrees. He is a graduate of Georgetown University and the Loyola University School of Law. He is one of the leading authorities in the House on the issue of independent counsel reform.

Also on the panel as Representatives, this very first panel we have this morning, is Congressman Jay Dickey. Congressman Dickey has represented the Fourth District of Arkansas since 1993. He is a member of the Committee on Appropriations. Prior to being elected to Congress, Congressman Dickey practiced law in his hometown of Pine Bluff and owned a local restaurant business. He has held leadership positions in a number of community organizations. He holds bachelors and law degrees from the University of Arkansas. He has been very instrumental in organizing this hearing and the issues that we're going to discuss today on independent counsel.

I welcome both of you. Chairman Hyde, you may proceed.

STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Mr. HYDE. Well I thank you, Mr. Chairman, for that fulsome and even extravagant introduction, but I am most grateful.

If I could get Mr. Schumer's attention. One can always count on my good friend Charles Schumer for a provocative presence. He certainly has been that this morning. We have heard serious

charges against the independent counsel investigating the President and his administration. I suppose I would like to make Ken Starr the issue if I were in his shoes. We do have the number three official at the Department of Justice, a man who ran the Department for a substantial portion of the first year sitting in a prison cell as we speak, because of Ken Starr's investigation.

Second, we have the First Lady for the first time in America's history testifying for 4 hours before a Federal grand jury because of Ken Starr's investigation.

Third, we have the current Governor of Arkansas, a close political associate of the President under Federal indictment because of Ken Starr's investigation. Who knows where his investigation will lead in the months ahead.

So if I were a White House strategist or a partisan Democrat, or even an indifferent Democrat, I guess I would be—not that such creatures exist—I would be——

Mr. SCHUMER. Match the number of indifferent Republicans.

Mr. HYDE. Yes. I would be tempted to make Judge Starr the issue and draw attention away from alleged corruption in Arkansas that touches the administration.

Judge Starr, Ken Starr is a man of the highest integrity. I think Judge Mikva, who is with us today, will vouch for that. He served with Judge Mikva on the U.S. Court of Appeals for the D.C. Circuit and as Solicitor General to the United States during the Bush administration. He has got a reputation for fairness, civility, and honesty. As Mr. Schumer mentioned, Sam Dash of Watergate fame is his official ethics advisor. He has approved all of the alleged conflict of interest issues that have come to Mr. Starr's attention. So I hope that disposes of the political side of this discussion this morning.

Thank you, Mr. McCollum and members of the Crime Subcommittee for holding these important hearings. This is precisely a good time to look at this bill. I was present at the creation. I have always had an abiding interest in the independent counsel statute. Our governmental system depends on checks and balances. I think the absence of adequate checks and balances in this area is felt rather seriously. I think this is an ideal time to look at it.

As you may recall during the last Congress, we engaged in a lengthy and often times contentious debate about reauthorizing the independent counsel statute. Ultimately, we did reauthorize it for 5 years. As part of that process and debate, I sponsored the Independent Counsel Accountability and Reform Act of 1993, legislation that became our substitute, the Republican substitute when this issue was considered on the House floor. Unfortunately, most of the needed reforms contained in that bill were not included in the final reauthorization. I don't intend to rehash the 1993–94 struggle in detail, but I would like to discuss some of the elements that I believe should be put in this controversial law.

First of all, the 1994 reauthorization did not require mandatory coverage for Members of Congress under the independent counsel law. Instead, whether or not Members of Congress are covered by the statute continues to be a matter that is within the Attorney General's case by case discretion. The 1994 act did include a new public interest standard to determine applicability, but that vague

subjective standard does nothing to ensure that Members of Congress are covered. My bill specifically included Members of Congress within the class of covered persons for whom a preliminary investigation is mandatory in instances where Federal criminal law may have been violated. Consistent with the Congressional Accountability Act that we passed earlier this year, we should not only live under the same laws as ordinary Americans, but also under the same laws as other policymaking Government officials.

Do you wish to recess while we all go vote?

Mr. MCCOLLUM. Mr. Chairman, if you would prefer to recess and then continue your statement since this is the second set of bells, then I think it probably would be appropriate.

Mr. HYDE. It takes some of us a little longer to get over there than others.

Mr. MCCOLLUM. I understand. Then let us be in recess until after this vote.

[Recess.]

Mr. MCCOLLUM. The hearing of the Subcommittee on Crime will come back to order again after our recess for the vote. Unfortunately, we probably will have other votes during the course of this hearing this morning, but we'll try to be as deliberate as we can with this.

When we recessed, Henry Hyde was expressing his views on the independent counsel law.

Chairman Hyde, you may continue.

Mr. HYDE. Thank you, Mr. Chairman.

It is also important that we revisit the standards contained in this law. Under the independent counsel law, the Attorney General first begins a threshold inquiry to determine whether a preliminary investigation is justified. If so, then undertakes a preliminary investigation to determine whether or not the appointment of an independent counsel is warranted.

This preliminary investigation must begin when the threshold inquiry finds "information sufficient to constitute grounds." That a covered person "may have violated any Federal criminal law other than a violation classified as a class B or class C misdemeanor or an infraction."

Many believe that this standard, which potentially triggers all the provisions of the independent counsel statute is far too low. Under its terms, mere allegations, assertions, rumor or hearsay still require the time, manpower, and resources of the Justice Department, which must be expended simply to conclude the negative. Often, allegations of criminal activity are prompted by political motives rather than real facts. We should require more real evidence up front, firsthand information that lends credibility to the allegation in the threshold inquiry stage before a preliminary investigation must be undertaken.

Once a preliminary investigation is underway, it takes on a political dynamic that makes it difficult for an Attorney General to call a halt. My bill would have allowed the Attorney General to dispose of frivolous nonsubstantive cases earlier in the process. In particular, it raised the standard for both beginning a threshold inquiry and deciding whether a threshold inquiry should become a preliminary investigation.

Under its terms, the Attorney General would undertake a threshold inquiry only when there is specific evidence from a credible source that a Federal criminal law has been violated. The Attorney General should only be required to investigate when there is some actual evidence that justifies going forward with a threshold inquiry. If the information received is so speculative or of such questionable veracity, then a fruitless investigation should not be undertaken.

My bill also provided—I'm not talking about the present legislation which Congressman Dickey has, but which follows my bill in the last session. My bill provided that the Attorney General could issue subpoenas for documents during the course of a preliminary investigation. The 1994 law included neither of these reforms. They should be adopted.

My bill provided for the appointing division of the court to set forth a more definite statement of the independent counsel's prosecutorial jurisdiction. It further limited the independent counsel to investigating those specific violations set forth in the statement and any others directly related to them. The 1994 law did not include either of these provisions.

There needs to be greater specificity when the court defines the jurisdiction of an individual independent counsel. Initially, the division of the court should confine the jurisdictional authority to the allegations of criminal activity that gave rise to the request for the appointment of an independent counsel in the first place. They should specifically and precisely define the exact purpose of each investigation. This would focus the investigation where it belongs on specific persons and specific alleged crimes. It would prevent open-ended investigations and the concomitant waste of taxpayers money.

An appointment as independent counsel is really not a hunting license. Of course when an independent counsel discovers a violation outside his or her jurisdiction, he or she must ask either for the court to expand their jurisdiction, and that's certainly in order, to go in and move for an expansion, or refer the new matter to the Department of Justice.

Another item of particular importance to me as a former member of the Select Committee on Intelligence, is the treatment of classified information during these investigations. An independent counsel is akin to a prosecutor. It is not his or her function to determine appropriate classifications of documents or evidence. In fact, an independent counsel has no competence to do so, since he or she can't possibly know what might compromise Government security. These are matters outside the purview of their expertise and their jurisdiction. They should handle classified information in the same secure manner as any other Federal officer or employee, and not second guess decisions made by persons charged with the responsibility to maintain our national security.

The 1994 law ultimately did include language that requires an independent counsel to follow Justice Department procedures relating to classified information, but despite documented abuses in this area, the law did not address the appropriate sanction for a violation of this provision. I continue to believe that such behavior should potentially be grounds for removal. More broadly, I continue

to believe that an independent counsel should follow all Justice Department prosecutorial standards and policies at all times during the course of their investigation.

My bill provided for a number of controls on the unchecked spending of independent counsels. One of these was to provide that the independent counsel be reappointed every 2 years and that he or she be required to seek a specific appropriation for any work beyond the second year. The 1994 law did provide for reappointment after the second year, the fourth year, and every year thereafter. But it did not provide for periodic appropriations. Such a change in the appropriations requirements would result in more consistent and effective oversight by both the division of the court and Congress.

My bill provided for other cost controls on pay of the staff and reimbursement of travel expenses. Although the 1994 law addressed these topics to some degree, I believe this aspect of the law could still be improved as well. The subjects of independent counsel investigations are generally individuals with limited resources. Whereas the independent counsel has nearly limitless resources with which to investigate the subject.

My bill contains several provisions aimed at achieving a more equitable balance between the parties. First, it allowed the subject to petition the appointing division of the court for an end to the investigation. Second, it allowed the subject to seek attorney's fees, not only when he or she was not indicted, but also when he or she prevailed at trial or on appeal. Finally, my bill provided for job protections for subjects of an investigation while the investigation was pending. I believe each of these steps would provide greater balance and infuse fundamental fairness into the process.

In conclusion, let me say that this is a law still in need of repair. I commend the subcommittee for reopening this debate. I commend Congressman Dickey for picking up the ball and running with it. I look forward to working with you on this important issue.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hyde follows:]

PREPARED STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Thank you, Chairman McCollum and members of the Crime Subcommittee.

As many of you will recall, during the 103rd Congress, we engaged in a lengthy and often contentious debate about reauthorizing the independent counsel statute. Ultimately, we did reauthorize the law for five years by enacting Public Law 103–270.

As part of that process and debate, I sponsored the Independent Counsel Accountability and Reform Act of 1993 (H.R. 3545)—legislation that became the Republican substitute when this issue was considered on the House Floor.

Unfortunately, however, most of the needed reforms contained in that bill were not included in the final reauthorization legislation. I do not intend to rehash the 1993–94 struggle in detail with you, but I would like to discuss some of the elements that I believe should be put in this controversial law.

CONGRESSIONAL COVERAGE

First of all, the 1994 reauthorization did not require mandatory coverage for Members of Congress under the Independent Counsel law. Instead, whether or not Members of Congress are covered by the statute continues to be a matter that is within the Attorney General's case-by-case discretion. The 1994 Act did include a new "public interest" standard to determine applicability, but that vague, subjective standard does nothing to ensure that Members of Congress are covered. My bill spe-

cifically included Members of Congress within the class of covered persons for whom a preliminary investigation is mandatory, in instances where a federal criminal law may have been violated. Consistent with the Congressional Accountability Act we passed earlier this year, I think we should not only live under the same laws as ordinary Americans, but also under the same laws as other policy-making government officials.

EARLIER DISPOSITION OF CASES

It is also important that we revisit the standards contained in this law. Under the Independent Counsel law, the Attorney General first begins a threshold inquiry to determine whether a "preliminary investigation" is justified and, if so, then undertakes a "preliminary investigation" to determine whether or not the appointment of an independent counsel is warranted. This preliminary investigation must begin when the threshold inquiry finds "information sufficient to constitute grounds" that a covered person "*may* have violated *any* Federal criminal law other than a violation classified as a Class B or Class C misdemeanor or an infraction." 28 U.S.C. § 591(a).

Many believe that this standard, which potentially triggers all the provisions of Independent Counsel statute, is far too low. Under its terms, mere allegations, assertions, rumor or hearsay still require that the time, manpower, and resources of the Justice Department must be expended simply to conclude the negative. Often allegations of criminal activity are prompted by political motives rather than real facts.

We should require more real evidence "up front"—firsthand information that lends credibility to the allegation—in the threshold inquiry stage before a preliminary investigation must be undertaken. Once a preliminary investigation is underway, it takes on a political dynamic that makes it difficult for an Attorney General to call a halt.

My bill would have allowed the Attorney General to dispose of frivolous, non-substantive cases earlier in the process. In particular, it raised the standard for both beginning a threshold inquiry and deciding whether a threshold inquiry should become a preliminary investigation.

Under its terms, the Attorney General would undertake a threshold inquiry only when there is "specific evidence" from a "credible source" that a federal criminal law *has* been violated. The Attorney General should only be required to investigate when there is some actual evidence that justifies going forward with a threshold inquiry. If the information received is so speculative, or of such questionable veracity, then a fruitless investigation should not be undertaken.

My bill also provided that the Attorney General could issue subpoenas for documents during the course of a preliminary investigation. The 1994 law included neither of these reforms, and they should be adopted.

PROSECUTORIAL JURISDICTION

My bill provided for the appointing division of court to set forth a more definite statement of the independent counsel's prosecutorial jurisdiction. It further limited the independent counsel to investigating those specific violations set forth in the statement and any others directly related to them. The 1994 law did not include either of these provisions.

There needs to be greater specificity when the court defines the jurisdiction of an individual independent counsel. Initially, the division of the court should confine the jurisdictional authority to the allegations of criminal activity that gave rise to the request for the appointment of an independent counsel in the first place. They should specifically and precisely define the exact purpose of each investigation. This would focus the investigation where it belongs—on specific persons and specific alleged crimes. It would prevent open-ended investigations and the waste of taxpayers' money. Of course, when an independent counsel discovers a violation outside of his or her jurisdiction, he or she must either ask the court for an expansion of jurisdiction or refer the new matter to the Department of Justice.

CLASSIFIED INFORMATION AND OTHER DOJ POLICIES

Another item of particular importance to me as a former member of the Select Committee on Intelligence is the treatment of classified information during these investigations. An independent counsel is a prosecutor. It is not his or her function to determine appropriate classifications of documents or evidence. In fact, an independent counsel has no competence to do so since he or she can't possibly know what might compromise government security. These are matters outside the purview of their expertise and their jurisdiction. They should handle classified information in the same, secure manner as any other federal officer or employee and not

second-guess decisions made by persons charged with the responsibility to maintain our national security.

The 1994 law ultimately did include language that requires an independent counsel to follow Justice Department procedures relating to classified information. But, despite documented abuses in this area, the law did not address the appropriate sanction for a violation of this provision. I continue to believe that such behavior should potentially be grounds for removal.

More broadly, I continue to believe that an independent counsel should follow all Department of Justice prosecutorial standards and policies at all times during the course of their investigation.

COST CONTROLS

My bill provided for a number of controls on the unchecked spending of independent counsels. One of these was to provide that the independent counsel be reappointed every two years and that he or she be required to seek a specific appropriation for any work beyond the second year.

The 1994 law did provide for reappointment after the 2nd year, the 4th year, and every year thereafter, but it did not provide for periodic appropriations. Such a change in the appropriations requirements would result in more consistent and effective oversight by both the division of the court and the Congress.

My bill also provided for other cost controls on the pay of the staff and the reimbursement of travel expenses. Although the 1994 law addressed these topics to some degree, I believe this aspect of the law could still be improved, as well.

EMPOWERMENT OF SUBJECTS

The subjects of independent counsel investigations are generally individuals with limited resources, whereas the independent counsel has nearly limitless resources with which to investigate the subject. My bill contained several provisions aimed at achieving a more equitable balance between the parties. First, it allowed the subject to petition the appointing division of the court for an end to the investigation. Second, it allowed the subject to seek attorneys' fees not only when he or she was not indicted, but also when he or she prevailed at trial or on appeal. Finally, my bill provided for job protections for subjects of an investigation while the investigation was pending. I believe each of these steps would provide greater balance and infuse fundamental fairness into the process.

In conclusion, let me say that this is a law still in need of a repair job and I commend the Subcommittee for re-opening this debate. I look forward to working with you on this important issue.

Mr. MCCOLLUM. Thank you very much, Chairman Hyde.

Mr. Dickey, you may proceed. We'll put your entire testimony in the record.

STATEMENT OF HON. JAY DICKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Mr. DICKEY. Thank you, Mr. Chairman, members of the committee. Nine hundred and seventy-eight thousand dollars a month. I'll say it again. Nine hundred and seventy-eight thousand dollars a month is what we are spending on the Whitewater investigation right now. We haven't reached a trial. We haven't reached the heavy part of the expenditures, in my opinion, that we know are the legal costs. But we've got $978,000.

I am a member of the Appropriations Committee. We are telling people no all the time. We are saying no, you cannot have this, no you cannot have that because of our budget constraints. Yet we are spending $25 million and more on the Whitewater investigation at$978,000 a month. There has got to be a reference somewhere to a cost benefit relationship.

I am not qualified to talk about a lot of things compared to the next panel and compared to Mr. Hyde. I am privileged though to tell you, the only credential I do have. It is because I agree with Mr. Hyde. Back in 1994, I was one of 56 who voted against this

statute. I knew that something inherently was wrong with it from an expenditure standpoint. It was wasteful. It was difficult for us to keep our eye on the budget matters and say yes, but the independent counsel is in fact open to spend whatever it wants to. That is a different story.

What we are doing is we are encouraging the appetite for scandal and destroyed lives in America with this. We are encouraging people to gain name recognition with public funds as independent counsel. We are getting to where we are feeding on this thing more and more and more. We are going to end up having to have an independent counsel to investigate the independent counsels.

So what I am saying is that we've got something that is running amuck. If it hadn't been for Mr. Hyde's leadership, we probably wouldn't be looking at it today. If it wasn't for the fact that you all think that the American people should hear about this, we wouldn't probably have a forum. So I am thankful for that.

I'd like for you all to look at the chart, if you can or if you care, if you can see that far. We've got it pretty far away. I want you to see at the bottom of that line is $95 million. That is what has been spent on independent counsels up to March 31, 1995. We are now at $112 to $115 million that we've spent. Let's look at some of these. Remember, the only qualification I have is to point out the amount of money we're spending and what we are getting for it.

Adams is the first one. That is the HUD Pierce-Watt investigation, James Watt. We have spent $23 million on that investigation. It is still going. Mr. Watt was charged with 25 felony counts. They were all disposed of with one misdemeanor charge, one misdemeanor charge.

We have the expenditure of Mr. Walsh on Iran-Contra of $47 million. When he quit, and when he said no more, he was in the high 30's. Money has been added to that since then. It is going on and on and on, and even today there is some dribbling amounts that come in. But I think if you ask him how much he's spent, he'd say $35 million or something like that. It's not $47 million because of interpretations about pensions and about benefits that are coming in because it's the executive branch. It is absolutely out of control.

We can't have any conscience if we continue to have a statute that is running like this, without any controls whatsoever. We can't have any fiscal conscience, let me tell you this. What are the cost benefits? We have to work on that with EPA. We have to go through agony, trying to explain to those people who believe the EPA should just go and spend just like this too. If we are doing it with them and we're moving in that direction, we ought to move in this direction. We shouldn't be fearful of what the consequences might be, because we're going to have to answer to our children and our grandchildren if we keep spending like this.

If this is an example, we're going to take freedoms away from those people who follow us in the next generations. We're going to take freedoms away, not counting what freedoms are taken away right now, just with innuendos and statements like this and press conferences, and just mentioning somebody's name. It's like the McCarthy thing in a way. But I think we've got to look at it from a very serious standpoint.

There are some other things I want to mention briefly. We want some amendments to go into this bill. We think any—and this is after a lot of thought—any ongoing investigations right now should not be subject to this bill. What we are trying to do with the bill, to go back over it, is we are trying to bring this within the appropriation process after 2 years. Every independent counsel who is appointed from this point forward, or from the point when this is passed and signed into law, would have 2 years and they could spend all the money they want. All they would have to do is report monthly the amount, not what, but the amount. But then after 2 years, they would have to come into the appropriation process. That means having a budget.

I want to mention one budget that I think is pretty significant. The Public Integrity Section of the Attorney General's Office has a job investigating all the judges and the judicial people of the United States and all the system. They have got a budget of $3.5 million. No one has come up and said, "Well for heaven sakes, that's not enough money. We need to spend more." So we can do investigative work within a budget. I think we are compelled to do it in this case.

We have also a number of years—let's see. Also one other thing we—two other things we want to do. We want to amend this so that there will be no final report. We found that the final report of independent counsel can be abused, and it can be harmful. Now there are going to be differences on the next panel on this issue. But the final report again, is an expenditure that is rehashing and recasting and revising what has occurred. We have a situation where we have independent counsels set up so that we by the way it's established, we're going to have somebody on the opposite political spectrum from the person who is being investigated. I guess the Nation requires that. How else can you be independent, if you're not independent of the person you are investigating. That is one way that we go by it.

But this final report just gives them a chance to finally say something, to finally go into what is being done, and to get in any parts and comments that need to be made. That is fine if you want to do politics, but it's not fine when you start talking about fiscal responsibility.

We also want no outside employment as far—we're going to amend the bill so we have no outside employment. We have to worry about the conflict in the first place. We go to extremes to get people who are opposite from the people they are investigating. There should be no outside employment, again from the money standpoint. Now you'll hear it from other standpoints, but outside employment is going to take time away from concluding the investigation. So again, we have money being used in the delays that's caused by outside employment, putting aside the fact that there might be a conflict of interest.

Well this bill, what we are asking you to do, in conclusion, is to mark this bill up, make the amendments, add the amendments that you say, pass it to the full committee, and then to the House. Then let's see what we can do in the Senate. I want to do whatever I can. I pledge whatever I can do so that we can have a vote on this for the American people.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dickey follows:]

PREPARED STATEMENT OF HON. JAY DICKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Mr. Chairman and Members of the Subcommittee, thank you for holding this important hearing on a very timely subject.

I was one of 56 who voted against the Independent Counsel reauthorization in 1994 because it appeared that we were giving too much authority without requiring accountability. I did vote for a bill proposed by Chairman Hyde almost identical to H.R. 892, which is the subject of this hearing.

Many distinguished persons will voice their concerns to your committee about the Independent Counsel statute. Because they have more direct experience and expertise on this subject than I, my purpose today is to talk about only one facet of this problem; i.e., the appropriation problems that the current statute presents.

The budget crunch that this Congress has inherited after decades of undisciplined spending has forced us to make some really tough choices. One in particular is worthy of mentioning as a parallel to the Independent Counsel problem; the spending by the Environmental Protection Agency (EPA). In our quest to find some way to balance the budget and force this agency to join in the effort to be more efficient, we've adopted a "cost/benefit justification" rule. This simply means that a regulation must be able to state its benefit in relationship to its cost. Efforts to restrict spending at the EPA are being met with hysterical doom and gloom predictions and generalizations designed to play on emotions and to try to establish the idea that the EPA can do no wrong, is never guilty of excess and should, in fact, be untouchable in the budgetary process.

Here we have a similar problem: who would dare challenge the expenditures of the Independent Counsel? Also, who out there is going to stand up and ask for a cost/benefit analysis? This bill tries to do just that and I believe in a moderate way.

According to General Accounting Office (GAO) reports, over $95,000,000 has been spent on this statute since 1985. This sum counts expenditures through the end of March, 1995. If we add the monies spent since last March, this figure would far exceed $100,000,000.

Lawrence Walsh's reign alone in the Iran-Contra investigation cost the taxpayers $47,000,000, including unbelievably, the payment of retirement benefits for temporary employees! This does not include the cost of tying up the courts for years and years nor the costs to people who were wrongfully charged and had to defend themselves.

To date, the Whitewater independent counsel investigation has cost, the best we can determine, around $25,000,000 and still counting. GAO reports indicate that the *monthly* rate for Whitewater Independent Counsel spending is $978,000 through March 31, 1995. If this spending pace continues, Whitewater could eclipse Iran-Contra as the grand daddy of all Independent Counsel investigations. What benefits have we received from all this? How many convictions? Has it been worth it?

I have met the ire of some constituents back home when posing this question on a talk show. I know there are sincere people who believe that we must go all the way with White water since so many questions remain unanswered. However, how much money should we allocate to this endeavor—$50 million, $500 million, any ideas? More important, where should we go to get these dollars and whose budget should be cut to provide the funds?

The negatives that have come from the Independent Counsel expenditures, to name a few, are as follows: (a) whetting the appetite of an element in our society which feeds on scandal and destroyed lives; (b) giving a tool to whatever party is not occupying the White House to pound away in hopes of making political points and reoccupying it; (c) spending money in an area that benefits only lawyers, politicians and the media, while at the same time being unable to provide money for more worthy programs; (d) making it almost impossible for us to be credible when saying to other agencies that they must abide by the appropriation process when the Independent Counsel statute says spend as much as you like for as long as you like; (e) allowing Independent Counsel to attack whole industries; adding to an already overwhelming cost of doing business caused by governmental requirements and interferences; and (f) conclusively giving to our young aspiring citizen-politicians proof positive that they should opt out of public service, lest they be attacked and destroyed financially, personally, politically and perhaps even spiritually.

No individual or industry can withstand the scrutiny of such an investigation. This is particularly true when Independent Counsel are allowed to comment on the evidence at the end of the investigation; a person or industry's reputation can be

brought into the fray without an opportunity to defend the accusations, even if there have been no convictions or indictments.

Because such pronouncements are commonplace in this environment, we are contemplating putting a restriction in the bill to limit access by an Independent Counsel to the press. There could be a connection between all the media attention that an Independent Counsel can demand and his or her orchestrating the ongoing nature of the investigation. I also believe that the requirement that a final report be filed by an Independent Counsel should be eliminated.

Preventing outside work by an Independent Counsel will be discussed by others on a conflict or ethics level. There's a practical effect that needs to be considered: If one serving as Independent Counsel knows that he or she must complete the investigation before he or she can go back to a regular source of income, there is a greater chance that the job will fit a tighter time schedule. This, of course, usually leads to less money spent.

One last thing: The investigations that are presently ongoing should not be affected by this bill—for obvious reasons.

I am asking you to mark up this bill, pass it out of this subcommittee and the full committee and then help us pass it on the floor of the House. I look forward to working with you and would be happy to answer any questions.

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 28, 1996

The Honorable Jay Dickey
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Dickey:

This is in response to your letter inviting the Department's views on a bill you have introduced, H.R. 892. Your bill would make substantial changes in the procedures now in place pursuant to the Independent Counsel Reauthorization Act of 1994. While we understand the issues and concerns that led you to propose this legislation, the Department of Justice is unable to support your bill at this time, though we believe that some of these issues will warrant careful study in coming months and, perhaps, remedial legislation in the future.

As you are aware, the Act was reauthorized less than two years ago, following careful consideration of the provisions of the old Act that needed reform, including many of the problems that apparently concern you. These issues were the subject of considerable study, and led to specific legislative solutions. The solutions adopted by Congress in 1994 in response to perceived problems in the law are still in their infancy and without a fully developed track record. It is our view that it is premature to revisit these issues now.

The Act will expire and require reauthorization in 1999. At that time, we will have sufficient experience with the 1994 Act to permit informed debate about the present law and whether further changes are needed. Given the delicate constitutional balance of the Act and the extreme sensitivity of matters handled under it, it is our recommendation that any changes to the Act should be drafted with great care and carefully considered; we do not believe that piecemeal amendments to deal with perceived individual problems in the administration of the Act are appropriate. It is our opinion, after nearly two decades of experience with the Act, that most such problems are isolated occurrences, and do not support revision of the complicated balance of responsibilities under the Act. To the extent that procedural problems are identified and confirmed through experience, corrections need to be undertaken with the framework of the entire Act in mind.

In addition to these general views, we do have specific comments about many of the provisions contained in your bill.

Section 2: Extension

This section -- which on its face merely changes the name of the Act in the existing legislation -- has the effect of restarting the five-year reauthorization period. If it is your intent that this legislation serve as a substitute for the reauthorization that otherwise would have occurred in 1999, we suggest that the extensive hearings and study of experience under the current Act that have supported previous proposals for change in the course of reauthorization are needed first. This process should include an examination of Congress's views on how its greatly expanded oversight role has functioned, and the Special Division's observations on how its role has changed under the 1994 Reauthorization, though we believe those changes have been in effect for too short a period for meaningful observation now.

Section 3: Basis for Preliminary Investigation

This section makes extensive changes to the processes under which preliminary investigations are initiated. The current provisions have been carefully crafted through the course of years of experience with the Act. While the Department believes that lingering problems exist, as mentioned below, we do not understand the basis for the proposals in Section 3. We are unaware of any problems in the initiation of preliminary investigations that would be solved by this proposal, and indeed believe that the language proposed would significantly and unnecessarily complicate the process.

Under the current Act, during the initial inquiry period, the Department has 30 days to assess the information it has received and determine whether a preliminary investigation is necessary; the only issue to be considered at this point is whether the allegation and the information in support of the allegation is sufficiently "specific and credible" to warrant further investigation. The purpose of the initial inquiry is to weed out patently frivolous and unsubstantiated generalized allegations, to avoid the Department's being forced to commit resources to investigate an allegation, for example, that a certain covered person is a crook. While not perfect, the standard approximates the ordinary appraisal any prosecutor would give to information that comes to his or her attention in deciding whether an investigation should be initiated.

The Department objects to your proposed change on three grounds. First, the bill substantially reduces the amount of time the Department has to conduct an initial inquiry. This eliminates one of the most useful improvements achieved in the 1994 Reauthorization, which lengthened the initial inquiry period

to 30 days. Second, your proposal requires that the Department do what would amount to a full-fledged factual investigation in the shortened time period in order to evaluate the "sufficiency of the evidence." This is a new phrase in the Act, and while its meaning is not clear, it seems to confuse the initial inquiry stage with the preliminary investigation stage, during which evidence is gathered and weighed. Presumably, since it changes the former standard, the intent is to change the grounds on which the Attorney General is to reach her decision. Finally, your proposed change has the potential to block investigation of matters into which inquiry should be made.

The increase in the initial inquiry period from 15 to 30 days has proven to be an extremely beneficial change that permits sufficient time for decision makers within the Department of Justice thoughtfully and carefully to consider information that comes to it, in order to reach a reasoned decision as to whether the significant step of initiating a preliminary investigation is warranted. As the Attorney General pointed out in her testimony in support of the 1994 Reauthorization, 15 days is far too short to permit meaningful review of complex allegations.

The change in the standard the Attorney General must apply at the conclusion of the initial inquiry period also is problematic. The historic standard has been whether, at the end of the initial inquiry stage, grounds to investigate exist. This decision is to be made based on the credibility and specificity of the information available. This standard is designed to approximate as closely as possible the discretionary decision made by every law enforcement official when information suggesting the possibility of a criminal violation comes to his or her attention, and a decision must be made whether further investigation of the allegation should be conducted. It is not intended to be a high standard; it is intended merely to winnow out frivolous or clearly meritless allegations before the formal steps that accompany a preliminary investigation are required. Other than the statutory handling of the issue of intent, discussed below, to which we would welcome change at any time, we are aware of no problems with the initial inquiry or preliminary investigation standards that would require changes at this time.

The proposed standard may have the unfortunate result of barring the investigation of potentially serious matters. Your proposed language seems generally to require far more concrete "evidence" of a criminal offense before the Act is triggered. It also appears that the changes seek to limit the exercise of sound prosecutorial judgment on the part of the Attorney General and her staff in determining whether a particular matter requires further investigation. As a result, were this bill to pass, some allegations that should be investigated would fall through the cracks, while the changes do nothing to eliminate coverage of

minor offenses that do not warrant appointment of an Independent Counsel.

Finally, as a related matter, your bill fails to address the most serious problem with the triggering provisions, the handling of the issue of intent in the current Act. The treatment of the issue of intent in section 592(a)(2)(B) has been strongly objected to by the Department since it was adopted in 1987. It is, we believe, a good example of the kind of harm done by legislative changes in this Act in response to isolated events; Congress adopted this change because it disagreed factually with the Attorney General's assessment of evidence of criminal intent in the course of one Independent Counsel matter. Under the current provision, the Attorney General is forbidden to decline to initiate a preliminary investigation because of a lack of evidence of criminal intent, in spite of the fact that criminal intent is a necessary element of every serious crime; she is also forbidden to decline to seek appointment of an Independent Counsel at the end of a preliminary investigation absent "clear and convincing" evidence of a lack of criminal intent, a standard that turns ordinary investigative standards on their head.

The Attorney General testified at length concerning the serious problems created by this provision during the 1994 Reauthorization, but Congress did not address the problems created by the peculiar way the element of criminal intent is handled under the Act. If requirements for the handling of the initial inquiry are to be amended in any way, this issue should be the primary focus of any change.

Section 4: Jurisdiction of Independent Counsel

The bill proposes to narrow the scope of an Independent Counsel's jurisdiction by requiring that his or her jurisdiction be limited to the specific alleged violations of criminal law that gave rise to the Attorney General's application for the Independent Counsel's appointment, together with matters directly related to those allegations, such as obstruction of justice and perjury. The bill eliminates the language in the current Act that allows an Independent Counsel to pursue matters that "arise out of" his or her investigation.

The legislation as proposed blends two distinct concepts under the current Act. As currently drafted, in addition to the core jurisdiction over the specific allegation against the covered person, an Independent Counsel has jurisdiction over both "related matters," and over "matters that arise out of" the investigation. Related matters are those matters that, as a matter of effective and efficient prosecution, need to be handled by the Independent Counsel so that he or she can proceed to resolution of the core matters that are the subject of his or her investigation.

For example, if a covered person is under investigation for tax fraud, the Independent Counsel may discover that the subject's bookkeeper had made false entries in financial records; that person's cooperation might prove useful in the underlying investigation in order to develop witnesses and evidence against the covered person. In contrast, matters "arising out of" the Independent Counsel's investigation are allegations of crimes that result from the investigation itself, such as obstruction of justice, witness intimidation, or perjury. The legislative proposal contained in H.R. 892 confuses and merges the two distinct concepts, and further muddies the already complicated issues surrounding the scope of an Independent Counsel's jurisdiction.

In light of the Eighth Circuit's pending decision in United States v. Tucker, it is not appropriate for the Department to comment at this time about whether future legislative attention to this complex issue will be warranted.

Section 5(a): Provision of Office Space

Section 594(l)(3) of the Act currently requires the Administrator of the General Services Administration, in consultation with the Director of the Administrative Office of the United States Courts, to provide office space for each Independent Counsel within a Federal building (or less costly space elsewhere). The Act also provides for temporary office space, equipment and supplies until appropriate permanent space is available.

The bill proposes to eliminate the consultation requirement with the Director of the Administrative Office of the United States Courts, and to eliminate the provision of temporary office space, equipment and supplies. This change seems unwise. Delay in Independent Counsel investigations appears to be one of the concerns repeatedly identified by Congress; temporary office space, equipment and supplies permit an Independent Counsel to commence promptly his or her investigation. See, S. Rep. 101, 103rd Cong., 1st Sess. 24 (1994).

Section 5(b): Compliance with Department of Justice Policies

Section 594(f) of the Act requires an Independent Counsel to comply with the written or other established policies of the Department respecting enforcement of the criminal laws, except to the extent that doing so would be inconsistent with the purposes of the Act. During the 1994 Reauthorization, the section was amended to require an Independent Counsel's consultation with the Department to determine these policies.

The bill proposes to change this section to require an Independent Counsel to comply with the written or established

policies of the Department respecting enforcement of the criminal laws and to the release of information relating to criminal proceedings at all times. The consultation requirement, which was a good addition to the Act, would be eliminated.

There are instances in which strict adherence to the policies of the Department would be contrary to the purposes of the Act. For example, federal prosecutors employed by the Department must secure the approval of the Organized Crime and Racketeering Section of the Criminal Division before RICO charges can be brought; similar approval is required from the Tax Division for various violations of Title 26. Requiring this approval for an Independent Counsel clearly would compromise his or her independence. On the other hand, an Independent Counsel should enforce the law consistently with the Department. Thus, the consultation requirement encourages the Independent Counsel to seek and consider the views of the Department, while not mandating that he or she obtain its approval.

The consultation requirement encourages cooperation between the Department and the Independent Counsel on a number of issues, ranging from resources to prosecutorial experience to institutional memory; the purpose of this provision was to foster a productive working relationship between the Department and the Independent Counsel. It has already been the experience of the Department that communications between Independent Counsels and the Department have been greatly improved. We see no reason to eliminate this useful provision from the Act.

Finally, we believe that the new requirement concerning the release of information is unnecessary, because it is already subsumed in the Act's requirements.

Section 5(c): Independent Counsel Funding

The bill contains an amendment that would limit the funding for the Office of an Independent Counsel to two years following the Independent Counsel's appointment. After that time, funding for the office could only be provided through a specific appropriation. We believe that this provision raises constitutional issues, and in any event, would be an extremely unwise procedure to adopt. Essentially, it would give the Congress specific and detailed control over the course of the Independent Counsel's investigation, and even the power to terminate such an investigation or prosecution for any reason whatsoever, including political reasons, by merely failing to appropriate funding. It would also permit the political manipulation of the scope of the investigation, simply by sharply restricting funding. Such unprecedented intrusion into the handling of a particular criminal investigation would be an unwarranted and inappropriate intrusion of the legislative branch into executive branch functions.

Section 6(a): Specified Grounds for Removal

The bill proposes to specifically include in section 596, the provision that provides for removal of an Independent Counsel by the Attorney General, an Independent Counsel's failure to comply with the established practices and policies of the Department of Justice (as set forth in section 594(f)) or the conflict of interest provisions (as set forth in section 594(j)) as grounds for removal. The Department believes that to the extent violations are substantial and intentional, the failure of an Independent Counsel to comply with these provisions already falls within the definition of removal for "good cause" under section 596, and therefore the proposed amendment is unnecessary.

Section 6(b): Termination of Office of Independent Counsel

Section 596(b)(2) of the Act currently provides for the involuntary termination of an Office of Independent Counsel by the Special Division of the Court on its own motion or upon the request of the Attorney General only if the work of the Independent Counsel has been completed or so substantially completed that it would be appropriate for the Department of Justice to complete the remaining investigation and/or prosecutions. Thus, if the work of an Independent Counsel has been completed, but for some reason he or she has not left office, there is a procedural remedy available to bring closure to the matter.

The bill proposes to allow the subjects of an Independent Counsel's investigation to petition the Special Division to terminate an Office of Independent Counsel if such petition is filed at least two years after the Independent Counsel is appointed. In addition, the Special Division may terminate an Office of Independent Counsel if it determines that to do so would be "in the public interest."

This provision would provide a unique benefit to the subjects of Independent Counsel investigations. No other subject of a criminal investigation can make such an appeal to the judiciary, which is unfamiliar with the investigation and lacks supervisory authority over the prosecutors, to terminate an investigation. Permitting the judicial branch to terminate a criminal investigation because it would be "in the public interest" would constitute an inappropriate invasion of executive branch authority by the judicial branch, thus raising significant constitutional concerns. The Act already contains sufficient provisions for the termination of an Office of Independent Counsel, and we see no need for this change.

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Section 6(c): Monthly Expenditure Reporting Requirement

The bill proposes to require Independent Counsels to report monthly to the appropriate House and Senate Committees all of the Independent Counsel's expenditures. Independent Counsels are currently required to do this every six months. A monthly reporting requirement would be quite burdensome for Independent Counsels with seemingly little benefit. We are also concerned that if detailed enough to provide meaningful information to Congress for oversight purposes, such information would risk compromising an ongoing criminal investigation.

Section 6(d): Application for Reappointment

During the 1994 Reauthorization, a new provision was added to section 596(b) of the Act which provides that the Special Division of the Court shall determine, on its own motion, whether termination of an Office of Independent Counsel is appropriate no later than two years after the appointment of an Independent Counsel, at the end of the succeeding two-year period, and thereafter at the end of each succeeding one-year period. The bill proposes the addition of a new provision, section 596(d), which would require an Independent Counsel, every two years after appointment, to apply to the Special Division of the Court for reappointment. Failure of the court to affirmatively reappoint would result in termination of the Office of Independent Counsel.

This proposal seems superfluous in light of the stringent review schedule added to section 596(b) of the Act during the last reauthorization, though since the new provisions have not even been given a chance to come into play yet, it is hard to assess their effectiveness. If the goal is public awareness of the Court's review, there are certainly less cumbersome means to accomplish this.

More importantly, however, we have been and continue to be wary of any provision that requires the periodic reappointment of Independent Counsels by the Special Division of the Court. As Attorney General Reno testified during the 1994 Reauthorization, we believe these procedures constitute too great an intrusion by the Court into the investigative responsibilities of the Independent Counsel. While the limited role of the Court in appointing the Independent Counsel is appropriate, any continuing oversight function is constitutionally suspect and unwise as a matter of policy. We therefore recommend against this proposal.

Section 7: GAO Report

The bill proposes to add a requirement that GAO submit to Congress, not later than one year after the enactment of this new legislation, a report making recommendations for further reforms concerning cost controls on the Offices of Independent Counsel.

We have no particular objection to this proposal, although we do not believe that legislation is required in order to ask for a GAO study.

Summary

In summary, we generally recommend against any further incremental or wholesale changes to the Act until the passage of time gives Congress and the Department a solid factual basis on which to judge the merits of various provisions of the Act, both new and old.

Thank you for the opportunity to express the Department's views on this proposed legislation. Please do not hesitate to contact me if I can provide further assistance with regard to this or any other matter. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

Andrew Fois
Assistant Attorney General

Mr. MCCOLLUM. Thank you very much, Mr. Dickey. By previous arrangement and agreement, we are not going to question the two congressional witnesses. We want to move on to our second panel today, a very fine panel, to discuss this issue from the background and perspective of those who have worked with the independent counsel law, either being the counsels or having some direct relationship with the process.

I'd like to at this time introduce the four witnesses on this panel. I ask that they come forward and be seated. We should have their nameplates put up there for them very shortly.

Our first panelist is Lawrence E. Walsh, of counsel to the law firm of Crowe & Dunlevy in Oklahoma City, OK. From 1986 to 1993, he served as the independent counsel investigating what has come to be known as the Iran-Contra affair. From 1961 to 1981, he was a partner in the New York firm of Davis, Polk & Wardwell. He served as Deputy Attorney General of the United States during the second term of the Eisenhower administration, after having been a U.S. district judge from 1954 to 1957.

Judge Walsh has given of his time to numerous organizations, has served as a trustee of Columbia University, president of the American Bar Association, and Deputy Head of the U.S. Delegation to the Paris Peace Talks on the Vietnam War. Mr. Walsh holds bachelors and law degrees from Columbia University.

Abner J. Mikva served as White House Counsel under President Clinton from October 1994 to November 1995. Prior to that, he was a circuit judge of the U.S. Court of Appeals to the District of Columbia from 1979 to 1994, serving as Chief Judge of the circuit from 1991 until this retirement from the bench.

Judge Mikva also served as a Member of Congress from 1969 to 1973, and again from 1975 until his appointment to the bench in 1979, serving on both the Judiciary and the Ways and Means Committees. He has taught at several prestigious law schools, and is the author of undergraduate and law school text on Congress. He earned his law degree from the University of Chicago.

Theodore B. Olson, our third witness, is a partner in the Washington, DC, firm of Gibson, Dunn & Crutcher, specializing in constitutional law and appellate litigation. From 1981 to 1984, Mr. Olson served as Assistant Attorney General of the Office of Legal Counsel in the Justice Department. As such, was the principal legal advisor to the executive branch. Mr. Olson has been the subject of independent counsel investigations, although never indicted in any criminal violations. He has represented as counsel, other persons who were the subject of independent counsel investigations.

Mr. Olson received his law degree from the University of California at Berkeley, and his bachelors degree from the University of the Pacific. I never say that right, Joe, I should. I know him quite well and from past experience with his past, but I just don't say it right.

Our fourth and final panelist is Joseph E. diGenova.

He's a founding partner in the Washington, DC, law firm of diGenova & Toensing. His practice emphasizes the resolution of disputes with Federal Government agencies. In December 1992, he was appointed as independent counsel to investigate allegations

concerning searches to the passport file of then Presidential candidate Bill Clinton. Mr. diGenova also served as the U.S. attorney for the District of Columbia, the largest U.S. attorney office in the country. He also served as chief counsel and staff director on the Senate Rules Committee, and as counsel to the Senate Judiciary, Governmental Affairs, and Select Intelligence Committees.

He has published numerous articles on criminal law issues, terrorism, and congressional oversight, and has made television appearances on "60 Minutes," "Face the Nation," "This Week With David Brinkley," and the "Today Show," among others. He is a graduate of the University of Cincinnati, and the Georgetown University Law Center.

I welcome our panelists, and I think I should begin by going in the order in which I introduced you. Judge Walsh, you may proceed. Your full statement will be entered in the record, and you may summarize or give us what portion of it you wish.

STATEMENT OF HON. LAWRENCE E. WALSH, FORMER INDEPENDENT COUNSEL, RETIRED U.S. DISTRICT JUDGE, AND COUNSEL TO CROWE & DUNLEVY

Judge WALSH. It's an honor to be on this panel, and an honor to follow Chairman Hyde and Congressman Dickey. As the person who may have aroused many of the questions before the committee, I am available for whatever further questions you now want to ask me. But I have a few observations that I hope will not be overlooked.

The first is that the principle benefit of this act is not the indictments and convictions that have ultimately flowed from some of the investigations. It's the determination that some person under investigation was not guilty and a report clearing that person. That is the reason for the final—that is one of the reasons for the final report, as well as to permit Congress to have a full understanding of what went on.

I think of the case of Secretary Donavan, who was the Secretary of Labor years ago, and the report that Leon Silverman filed as independent counsel, which was a classic. Four hundred pages explaining why the witnesses were not credible, and why the secretary should not have been prosecuted.

Most of the independent counsels have ended up that way. The advantage of a court-appointed independent counsel is that not only is the Attorney General removed from the subject matter itself, but he or she doesn't even participate in the appointment of the person who conducts the investigation. So before we give up that kind of an advantage, I hope you will look at the other side of the equation.

The second suggestion that I make of a broad nature is that the route to economy, the route to avoiding the excessive use of this office lies in limiting the number of appointments. I'm just thinking of examples which I have in my statement. It should not be used to investigate an event that happened before a Federal officer takes office. It should not be used to investigate something before he takes the oath of office.

This kind of expensive treatment, and it is expensive, there's no way in which you can create a law office and match the prices of

the Department of Justice. The Department of Justice has its built in facilities, its library, its equipment, its years of experience in the file cabinets, its years of precedents. An independent counsel coming to work, all he has is a yellow pad and a pencil that he brings with him. He has nothing else. He is given a set of chambers in the courthouse which a judge happens to have left, which has usually a stale library and—well, I won't say what it has.

But the fact is, he has to start from scratch. He has to immediately convince a number of young lawyers to come to work for him, to give up their careers, their progress in their firms, and come with him for 1 year or 2 or 3, sometimes 6. Now that is not an easy sell, to say nothing of getting older lawyers with prosecutorial experience to come with him.

So when you do this, you have to be able to give them some kind of assurance that their work is not going to be overshadowed or going to be hampered or heckled at every step and turn; that they are doing something that the Government wants them to do; that they are not an interloper who is intruding where he's not wanted; that although he is not wanted by the administration, he is brought in under the aegis of Government, under the aegis of a statute of this Congress, and under the appointment of the court.

Now if you want independent counsel to do the job, fine, ask him to do it and let him do it. But if you want to save money, you can never save money using an independent counsel. It is a very expensive venture. In a case like mine where you have classified information to deal with, that added literally 20 percent that we could account for. I mean I'm not talking about indirect costs about being hampered in your work by it, but you have to set up special facilities. You have to have round the clock police. Then when you indict someone, you have to set up a special facility for them. That all comes out of the independent counsel's budget.

So that is why an independent counsel investigating the national security community is going to have even higher rates than an ordinary independent counsel. But this is something that is an important concept in a very limited number of areas. I think it has been excessively used, for example, whether Hamilton Jordan smoked marijuana at some point. To set up an establishment like this to determine that seemed to be excessive now as we look back at it over the years. Certainly using this expensive apparatus to investigate activities before a person takes Federal office is hard to justify.

Now you may say that an attorney general would be embarrassed and have a conflict of interest perhaps investigating a fellow Cabinet member for something he did or is said to have done before he took office. But the fact is, that conflict can be taken care of in another way, either by an Attorney General's appointed independent counsel, or by designating a career officer in the Department of Justice, who has no political affiliation. We happen to have Jack Keeney here now, who is now the Assistant Attorney General, a career officer who has had no ties to either party. There are people like that who could be designated without political supervision. Cut out the political upper crust of the Department, but let them make that sort of an investigation for matters that are said to have occurred before a person even takes his oath of office.

Then perhaps the Attorney General should be required to make some sort of a finding of public interest in an independent counsel's expenditure. That it's not just a matter of whether some item happened during a Federal officer's activity, but whether it is of such significance that it requires the special treatment.

In Iran-Contra, we had a constitutional confrontation, which I think would meet most standards for the appointment of independent counsel. Others don't quite rise to that level. But I think that is the area, and I think Chairman Hyde was trying to get into that area too, about whether there is an excessive number of appointments.

I think the other things before the committee, I have covered in my statement. The bill suggests that the appointing court should not be able to expand the statement of jurisdiction of the independent counsel beyond that specified by the Attorney General. I point out that when we ask a court to do something, we don't give the court a ministerial function. We ask it to use its judgment as a court and lawyers as it acts in any ordinary case. In my case, Attorney General Meese referred to the court, the question of—there were two—I had to deal with two covert actions which were intertwined, the resupply of the Contras and the Iran arm sales.

The Attorney General only referred the Iran arms sales. Now an investigation of the Iran arms sales could not be carried out without understanding the problems of Contra resupply, because one of the reasons for continuing the Iran arms sales was to raise surplus funds to fund the Contra resupply after this Congress had forbidden any intelligence entity to do that. The NSC is an intelligence entity.

To have tried to do the job with only jurisdiction over half of it would have been wasteful and very unsatisfactory. The court quite wisely rounded it out, because this was all public information at the time. The court read the newspapers like everyone else, and knew what the facts were.

Similarly, Attorney General Meese only would refer the case against Oliver North. To have looked at Oliver North as an individual, and not looked at all of those for whom he was working in a sense, and from whom he was getting support, I think would have been a very wasteful thing. So I think to tie the hands of the appointing court, as this bill would do, would be not in the public interest.

On the requirement that the Attorney General's guidelines be followed by the independent counsel, and that it be a basis for removal if he doesn't do it, I suggest that the circumstances of an ordinary prosecutor and the independent counsel are quite different. An ordinary U.S. attorney like Joe diGenova, he has the administration behind him, most of the time. So that the agencies of Government move forward to help him.

The independent counsel is brought in like a lawyer with a derivative action against a corporation. You may say he is suing in the name of the corporation, but everybody in the corporation hates him. So he is coming in to deal with a hostile client, if you would. So to hold him to the same standards minutely that a U.S. attorney would be held to, I think would be detrimental. The present statute allows flexibility. It says he should do it unless it's impos-

sible. The courts have power to act if he is arbitrary. Both North and Poindexter moved to dismiss indictments as not within the guidelines of the Department. The courts denied that motion both times. But it had power to dismiss those indictments. So I don't think it needs to be tightened up any more than it is.

Then finally, to give the subject of an investigation the power to move for the dismissal of the independent counsel seems to me to load the litigation against him. In most lawsuits, lawyers stand on an equal footing. You don't go to your opponent saying I'm going to compel your client to discharge you if you don't do this or don't do that. It seems to me that this provision loads the dice too much against the independent counsel. He has enough problems without it, and the Attorney General has the power to remove him.

If he has done something really so wrong that he should be removed, the Attorney General should be willing to take the political heat of doing it. It shouldn't be left for a private litigant to ask a court who is half anonymous to do it for him.

That is all I have to say, Mr. Chairman. I appreciate the opportunity to speak to you.

[The prepared statement of Judge Walsh follows:]

PREPARED STATEMENT OF HON. LAWRENCE E. WALSH, FORMER INDEPENDENT COUNSEL, RETIRED U.S. DISTRICT JUDGE, AND COUNSEL TO CROWE & DUNLEVY

I appreciate the Committee's invitation to testify regarding the proposed amendments to the Independent Counsel Act.

From December 1986 until January 1994, I served as Independent Counsel in the Iran/Contra matter.

Perhaps the most important function of the Independent Counsel Act is to give the Attorney General an additional layer of insulation when he has a conflict of interest. Before the Independent Counsel Act was enacted the Attorney General could appoint an Independent Counsel when he had a conflict of interest; but his making the appointment and selecting the Independent Counsel, in itself, could arguably be affected by his conflict of interest. The Independent Counsel Act provided for the selection of the Independent Counsel by a disinterested court rather than by the Attorney General.

The most important benefit of this added insulation arises in the case of a person, who although investigated for a crime, is not indicted. The credibility of the decision not to proceed is heightened by the exclusion of the Attorney General in selection of independent counsel. In most of the cases in which Independent Counsel have been appointed, there have been no indictments and the reports of Independent Counsel giving the reasons for not indicting have been of substantial value to the person under investigation and to the public.

As one of the Independent Counsel whose investigation did result in indictments and convictions, I respectfully address a few comments to the changes under consideration.

The proposal to require the appointing court to define with specificity the jurisdiction of the Independent Counsel and limit that jurisdiction to the alleged violations of criminal law specified by the Attorney General would, in my case, have caused considerable difficulty and increased expense. Attorney General Meese, when requesting the appointment of Independent Counsel, limited his request to matters relating to the sale of arms to Iran. He did not include matters regarding the resupply of the Contras, an insurgent group in Nicaragua, although these two covert operations were closely linked and one could not be understood without the other. The appointing panel knew from public information that the two covert actions were intertwined—because the funds from the Iran arms sales were used to pay for weapons for the Contras. It accordingly expanded the jurisdiction of Independent Counsel to include criminal violations in connection with Contra resupply as well as the sale of arms to Iran. It would have been wasteful to proceed otherwise. It would have been wasteful for separate groups to investigate such intertwined activities. Several of those engaged in one activity were also engaged in the other. One of the motives for continuing the Iranian arms sales was to finance the Contras. The proposed change would permit the Attorney General with his conflict of interest, to arbitrarily

deprive the public of a well-conducted investigation, one which could not be complete and which would have unnecessary difficulty in reaching a just result. It is therefore respectfully recommended that the matter of the exact definition of the jurisdiction of the Independent Counsel be left to the judgment of the independent court.

A similar problem is presented by the proposal to restrict the scope of the independent counsel's activity to "matters directly related" to the criminal violations referred by the Attorney General. In the Iran/Contra matter, Attorney General Meese centered his request upon Oliver North, who was by many considered a scapegoat for the policies of higher ranking officials in the Reagan Administration. The appointing court, on the basis of information already made public, recognized the need to examine the activities of others besides North. It expanded the jurisdiction of Independent Counsel to include those in Government who acted with North, those outside of Government who acted with North; and private citizens acting in concert with Government officials who were working with North. This permitted a comprehensive investigation of a series of activities that were closely interlocked, having as a common purpose—deceiving Congress. It is my recommendation that the Court be allowed ample discretion to deal with an attorney general's request especially when that attorney general has a clear conflict of interest which might tempt him to arbitrarily narrow the request.

The proposed bill would require the independent counsel, at all times, to conform with the guidelines of the Department of Justice. In almost all cases, the independent counsel would do this. But the present law allows for an exclusion where compliance would be inconsistent with the purposes of the Independent Counsel Act. The Attorney General, in ordinary cases, has the power to alleviate the strict applicability of the Department's guidelines. The independent Counsel, in the cases assigned to him, should have a comparable power because the conditions confronting an independent counsel are somewhat different from those confronting a regular line investigator in the Department of Justice. In most cases, independent counsel is dealing with a hostile government, rather than a supportive one, which may require him to consider prosecutions—proper under the law, but not usually encouraged by the Department of Justice. There should be flexibility on Independent Counsel's part to adapt to these different circumstances.

For the same reason the failure of an Independent Counsel to comply with the established policies of the Department of Justice should not be grounds for removal. As I have already explained, rigid compliance with those policies may not always be possible because of the differences in the problems confronting independent counsel from those confronting the Attorney General. A failure by the independent counsel, in this respect, can be dealt with by the courts in an individual case and it should not be a matter which would put the independent counsel's continuation in office in jeopardy. Motions raising this issue were made in the North and Poindexter cases and were denied.

Perhaps, the most serious problem for the Committee to consider is the proposed provision that no funds may be expended by the Independent Counsel after two years without a specific appropriation making additional funds available. Congress has been looked to for legislation and political judgment as to appropriations for the Department of Justice, but not for the control of individual cases. They are supposed to be handled without political intrusion. The enforcement of the law in terms of individual cases has traditionally been free of the political judgment of Congress. This proposal would break that barrier and permit a Committee on Appropriations to address the continuation or discontinuation of an individual case or cases, or an individual investigation or group of investigations.

Under the present law, the Attorney General may remove an Independent Counsel and the appointing court also can terminate an office of Independent Counsel. The proposed bill before the Committee would permit the subject of an investigation to request the court to take this action. Once an Independent Counsel is appointed, he should be in the same position as a usual federal prosecutor. He should not be subject to harassment that puts him at a disadvantage with his adversaries and impedes the progress of his work. The Attorney General has full power to act and he must take the full force of criticism, political and public, if he decides to interrupt the work of Independent Counsel. Private litigants should not share this power.

The additional reporting requirements that necessitate monthly reports simply add to the administrative costs and problems of an Independent Counsel. The accurate allocation of ongoing expenses would be overly burdensome and it is doubtful they would increase the public value enough to justify the expense. Monthly reports rarely would show a trend of significance. The present requirement for reports every six months should be sufficient.

In Section 6 subdivision (d) provides a requirement for the reappointment of Independent Counsel after two years. It is respectfully requested that this added hazard to a continuation of an Independent Counsel's work is unnecessary. He is subject to removal by the Attorney General. Subjecting him to an additional need to petition a court who has already appointed him seems superfluous and a further distraction of the Independent Counsel from his work.

In the end, once an Independent Counsel is appointed, the most beneficial course is to do those things which will encourage him to complete his office promptly. It would be best to leave him alone so he can complete his work and not distract him with harassment often reflected by the ill will of those with whom he must deal in his investigations and prosecutions.

Finally, I clearly understand the Committee's concern to reduce expenses where possible. The most promising way in which this can be accomplished is to restrict the number of appointments of Independent Counsel—not by trying to hamper an Independent Counsel in the conduct of his investigation. An investigation by Independent Counsel is an expensive undertaking. It should be restricted to the conduct of officials in federal office and not be authorized for the investigation of acts of a person before he becomes a federal officer. Even though an Attorney General confronted with the investigation of a colleague, for an act before the colleague held federal office, may be in a position of conflict of interest, that conflict of interest is of lower public concern than one arising from conduct during public service. As to the acts not committed in federal office, the Attorney General should proceed without the use of the Independent Counsel Act.

I thank the Committee again for inviting my views.

Mr. MCCOLLUM. Well, thank you very much, Judge Walsh. You have said quite a bit and we appreciate it. We'll be back with you for questions.

But first, I'd like, Judge Mikva, to give us your thoughts. We would certainly enter your full testimony in the record. You may summarize if you wish.

STATEMENT OF HON. ABNER J. MIKVA, FORMER WHITE HOUSE COUNSEL, RETIRED U.S. CIRCUIT JUDGE, AND RETIRED MEMBER OF CONGRESS

Judge MIKVA. Thank you, Mr. Chairman. I appreciate this opportunity to appear before my alma mater, and especially appreciate the work of Congressman Jay Dickey and of Chairman Hyde, to get the Congress to focus on changes that I think are necessary to make the independent counsel statute better serve the salutary purposes for which it was passed.

I still believe there is a need for an independent counsel procedure, but I think that it has to be vastly different from the one we have. I am aware that Congress addressed some of the problems when the statute was amended and reauthorized last year, but I think that those changes nibbled at the edges of the problems, the barnacles that have developed on the independent counsel procedure over the years since it's been initially adopted.

As Congressman Conyers—and I'm not sure anybody else was here at the time except Congressman Hyde—will remember there was strong bipartisan support for the idea of an independent counsel procedure when it was first created. I was in the Congress. I voted for it enthusiastically. I guess I've seen this independent counsel procedure from almost every angle, as a supporter in the first instance, as a judge reviewing some of the convictions that Judge Walsh obtained under the counsel, and then most recently, as a lawyer representing the subject of one of the independent counsel's investigations.

My enthusiasm for the statute was not then, and is still not based on the opportunity that it gave Democrats to bash a Republican administration, which was the political situation at the time. The procedure has always been subject to the criticism that it's being used for partisan advantage. I don't think that criticism is fair.

You have to recall that the original advocacy for such a procedure for an independent counsel was premised on the need that the incumbent Attorney General at the time, John Mitchell, could not be expected to conduct a full and fair investigation of John Mitchell. It was believed, and I still believe, that the American people ought to be assured that the Department of Justice is not covering up criminal conduct by an important Federal official either on its own or because of political pressure from the White House or from elsewhere.

Unfortunately, that limited purpose, that very limited purpose for which the statute was passed has been expanded over the years to cover all kinds of investigations for which the procedure is just not necessary and does not work. There have been some 16 or 17—Congressman Dickey, you count 17—separate exercises of this procedure over the years. In my opinion, almost all of them fell outside the limited purpose that I just described.

Incidently, I think that the idea of expanding the statute to cover Members of Congress is a very unwise idea and unnecessary. Not because I want to protect Members of Congress, but I think that the Department of Justice has shown very well that it can exercise free and independent judgment about Members of Congress. Some very important Members of Congress have been and currently are the subject matter of such independent judgment. I don't think you need this special procedure to cover that situation.

That's why I think that the most important reform that can be considered by this Congress is to raise the threshold for the initiation of the independent counsel procedure. It ought to be a special, unusual, almost extremely out of the ordinary kind of situation before this procedure ought to be invoked. I have to say that of the ongoing investigations being conducted by independent counsel, I think that only one, the Whitewater investigation, needed to have an independent counsel. That the conduct of the President himself and the First Lady were being questioned, made it necessary.

All of the others could have and would have been satisfactorily handled by the Department of Justice, past or present. Indeed—Judge Walsh, this is not intended—publicly, in any kind of personal way, in retrospect I think the only other one that was justified is Watergate. Iran-Contra would have been justified for a special counsel if Congress had been willing to keep its hands out of it. But I think that under *Castigar,* at least as it has been interpreted since by the court of appeals, there was no point in Judge Walsh going through all of that exercise and all of that expenditure if Congress was going to trump his opportunity to see whether the criminal justice system should be applied to any of the people involved.

So that out of the 16 or 17, perhaps two should have fallen under the special—the independent counsel procedure. That's why I think that you can't raise the threshold. It almost is—it isn't very impor-

tant what else you do do or don't do. I think that that just has to be raised.

The need for invoking the procedure, as I indicated, should always be premised on the strong concern that the regular investigative and prosecutorial procedures will be compromised by some kind of a conflict of interest. John Mitchell obviously could not investigate his own conduct. Well, it's absolutely essential therefore that the independent counsel should be free from concerns that he or she has conflicting interests. To that end, I think that the independent counsel should not be representing any other clients while they are performing as an independent counsel.

The appointment ought to be full-time. The appointees should be required to take a leave of absence from their regular position. Some independent counsels have treated the appointment that way. I think it ought to be required.

There is an additional reason why the independent counsel ought to be full-time. The investigation ought to be completed as quickly as possible. The appointees ought to devote all their time and efforts to that end. I would urge the change in the statute to make the initial appointment for 3 months full-time, and during that 3 months, the independent counsel in most cases ought to be in a position to decide either that there was no crime committed and get rid of it, or that the regular justice procedures properly can be exercised for the matters under consideration and send it back to where it came from, or that an independent prosecution is needed.

Only in the latter case should the appointing panel extend the term of the appointment for any material length of time. I know 3 months sounds like a very short period of time. But if these are as important, and if the procedures are as special as I suggest and as the original statute suggests, then it seems to me that we ought to treat the time factor as a very important one as well.

When an investigation goes on as long as some of the present procedures have, there is little likelihood that the American people will be reassured that justice is being done, and a lot of likelihood that there will be waste and unsatisfactory results. I think the waste has been demonstrated very well by Congressman Dickey's chart.

There's one example of an ongoing investigation, that went on so long that the independent counsel concluded that the primary subject of the investigation had grown too old to prosecute. I don't know what further proof you need that we have to do something to speed up this process.

I think the scope of the investigation for which the counsel is designated ought to be substantially limited. The existing statutory provisions which give the independent counsel, either initially or by getting leave of a court, the opportunity to investigate anything that is perceived to be criminal from the beginning of the world to the day of these presents, is just nonsense. We ought to constrain the jurisdiction of the special counsel.

If other criminal wrongdoing is discovered in the course of the investigation, that information normally could be turned over to the regular authorities for further action. The amount of time that the President had to spend, for example, responding to questions about his campaign expenditures when he was running for Governor of

Arkansas or about various people that he appointed to various positions in the State of Arkansas, and why he appointed them, is an example of how far afield we've gone with this idea of a special counsel procedure.

Then I think there's a need to restructure the appointment process. This is painful for me to talk about, because it involves some of my former colleagues, but I think there's a need to restructure the process under which the appointing panel itself is appointed and functions. The original plan in creating this special division of the Court of Appeals for the District of Columbia was to provide some diversity in the appointing panel and to remove any concern that the judges on the panel might be appointed for political reason.

A better way of alleviating those concerns which have arisen under the existing procedure, would be to constitute the panel, for example, with three Chief Judges of the circuit to be selected by lot so that no one is in the position of designating this person or that person. In any event, the judges appointed should be specifically subject to the same cannons of ethics and conduct applied to other Federal judges in every other context of their performance of duties. I think the recent decision suggesting that the appointing panel is free to perform under some other standards is unfortunate.

The main thrust of the independent counsel statute deals with appearances. The purpose was to assure the American people that no one in Government is above the law, and that even people in high places will be held to the same standard of behavior as everybody else. It was to be a special procedure reserved for special cases where normal handling by the Department of Justice would not suffice. For the statute to carry out that important purpose, the procedure and the investigations and actions taken under that procedure must be above reproach, and they must be special.

I think the statute needs to be fixed. Thank you, Mr. Chairman.

[The prepared statement of Judge Mikva follows:]

PREPARED STATEMENT OF HON. ABNER J. MIKVA, FORMER WHITE HOUSE COUNSEL, RETIRED U.S. CIRCUIT JUDGE, AND RETIRED MEMBER OF CONGRESS

I appreciate this opportunity to appear before my alma mater, and especially appreciate the efforts of Congressman Jay Dickey to get the Congress to focus on changes necessary to make the Independent Counsel statute to better serve the salutary purposes for which it was it was passed. I am aware that Congress addressed some of the problems when the statute was amended and reauthorized last year. However, those changes nibbled at the edges of the problems that the Independent Counsel procedure has developed over the years since it was initially adopted.

There was strong bi-partisan support for the idea of an independent counsel procedure when it was first created. I was in the Congress and voted for the statute enthusiastically. My enthusiasm was not based on the opportunity it gave Democrats to bash a Republican Administration; while there has always been criticism that the procedure is being used for partisan advantage, I don't think such criticism is fair. At the time of the original advocacy for an independent counsel procedure the need was premised on the belief that the incumbent Attorney General, John Mitchell, could not be expected to conduct a full and fair investigation of any alleged wrong-doing by John Mitchell. It was believed, and I still believe, that the American people ought to be assured that the Department of Justice is not covering up criminal wrong doing by an important federal official, either on its own or because of political pressure from the White House or elsewhere.

That limited purpose has been unduly expanded over the years to cover all kinds of investigations for which this unique independent counsel procedure is not needed and does not work. There have been some 16 separate exercises of the procedure over the years. I think most of them fell outside of the limited purpose that I just

described. (Just as I think the idea of adding Members of Congress to the covered subject class is beyond what is needed. The Department of Justice has shown all too painfully well that it can exercise free and independent judgment about Members of Congress. Some very important Members have been and currently are the subjects of such independent judgment.) That is why I think that raising the threshold for the initiation of the independent counsel procedure is the single most important reform that can be accomplished. Of the ongoing investigations being conducted by independent counsels, I think that only one, the Whitewater investigation, needed to have an independent counsel. The fact that it was conduct of the President himself which was being questioned made it necessary. All of the others could have and would have been satisfactorily handled by the Department of Justice, past or present.

There are other reforms that experience has shown are essential for the independent counsel procedure to function as it should. The need for invoking the procedure, as I indicated before, should always be premised on the strong concern that the regular investigative and prosecutorial procedures will be compromised by a conflict of interest. It is absolutely essential, then, that the independent counsel should be free from any concerns that he or she has conflicting interests. To that end, the independent counsel should not be representing any other clients while he or she is performing as independent counsel. The appointment ought to be full-time, and the appointee should be required to take a leave of absence from his regular position. Some independent counsels have treated the appointment that way, and it ought to be required. There is an additional reason that the appointment should be for a full-time counsel. The investigation ought to be completed as quickly as possible, and the appointee ought to devote all efforts to that end. I would urge a change in the statute to make the initial appointment for a three month, full-time period. At the end of that initial period, the independent counsel ought to be in a position to decide that there has been no crime committed, or that the regular Justice procedures properly can be exercised for the matters under consideration, or that an independent prosecution is needed. Only in the latter case should the appointing panel extend the term of the appointment for any material length of time. When an investigation goes on as long as some of them have under the present procedure, there is little likelihood that the American people will be reassured that justice is being done, and a lot of likelihood that there will be waste and unsatisfactory results. There is one example of an investigation that went on for so long that the independent counsel concluded that the primary subject of the investigation had grown too old to prosecute.

The scope of the investigation for which the independent counsel is designated ought to be substantially limited. The existing statutory provisions which give the independent counsel the opportunity to investigate anything that is perceived to be criminal from the beginning of the world to the day of these presents is foolish and wasteful. The original need for seeking an independent counsel ought to constrain the jurisdiction of the independent counsel. If other criminal wrongdoing is discovered in the course of the investigation, that information should be turned over to the regular authorities for further action.

There is a need to restructure the process under which the appointing panel is itself appointed and functions. The original plan in creating this special division of the Court of Appeals for the District of Columbia was to provide some diversity in the appointing panel and to remove any concern that the judges on the panel might be appointed for political reasons. A better way of alleviating those concerns, which have arisen under the existing procedure, would be to constitute the panel with three Chief Judges of the Circuits to be selected by lot. In any event, the judges appointed should be specifically subject to the same canons of ethics applied to federal judges in every other context of their performance of duties. I think the recent decision suggesting that the appointing panel is free to perform under some other standards is unfortunate.

There is little question that the main thrust of the independent counsel statute deals with appearances. The purpose was to assure the American people that no one in government was above the law and that even people in high places would be held to the same standard of behavior as everybody else. It was to be a special procedure, reserved for those special cases where normal handling by the Department of Justice would not suffice. For the statute to carry out that important purpose, the procedure and the investigations and actions taken under that procedure must be above reproach. The statute needs to be fixed.

Mr. MCCOLLUM. Thank you very much, Judge Mikva.

Mr. Olson, you may give us your testimony. Again, as in the case of the other witnesses, your entire testimony will be admitted into

the record without objection. You may summarize or proceed with whatever portion of it you wish.

STATEMENT OF THEODORE B. OLSON, PARTNER, GIBSON, DUNN & CRUTCHER

Mr. OLSON. Thank you, Mr. Chairman, members of the committee. It's a pleasure to be here. It's an important subject that Chairman Hyde and Congressman Dickey and this committee are considering. It is appropriate and timely that it be considered now, it seems to me. This statute when it was first enacted did have widespread support. The number of reservations about the statute and its operation have been growing. The reservations are being expressed on a bipartisan basis, from people on all sides of the political spectrum. Now that people in both political parties have experienced its operation and have direct experiences with the way the statute operates, it's a good time for everyone to take a look at it.

Like Judge Mikva, I have had experience with the independent counsel law from a variety of standpoints. First of all, during my tenure in the Department of Justice as Assistant Attorney General. Then, as you know, I was the subject of an independent counsel investigation, which was quite extensive in duration. Since then, I have represented subjects of independent counsel investigations.

As a result of all of those experiences, I am very critical of the independent counsel law. Unlike Judge Walsh and unlike Judge Mikva, I do not feel that the benefits of the independent counsel law outweigh the detriments and injustices that it brings about. I favor repeal of the statute. I favor going back to the system that the Framers of the Constitution devised for us in enforcing the law, and providing for misconduct if it occurs in the executive branch.

As Attorney General and later Supreme Court Justice Robert Jackson explained to the Second Annual Conference of U.S. Attorneys in 1940, a Federal prosecutor has more control over life, liberty and reputation than any other person in America. He or she can order prolonged and intrusive investigations, subpoena documents, obtain search warrants, secure approval to tap telephones, compel people to testify before grand juries, damage reputations, force people to go to trial, drive persons into bankruptcy, and generally disrupt or damage lives.

Any subject of a criminal investigation, especially if it is conducted in part in public, as most independent counsel investigations are, suffers great and irreparable damage simply by virtue of the investigation itself and its most basic consequences. While a prosecutor usually is an important force in seeing that justice occurs in this country, as Attorney General Jackson pointed out, if he acts from malice or other base motives, he may be one of the worst forces in society.

Because a prosecutor has such awesome power, it is essential that power be exercised within the constraints of institutional checks. As Attorney General Jackson also pointed out during that important speech, one of the worst things that a prosecutor can do is to select persons to investigate and then investigate them and find crimes. Because of the complexity of our Federal statutes and the breadth of them, virtually any of us could be accused of com-

mitting a crime at any time if you look through the statute books hard enough and long enough and investigate exhaustively enough.

Most prosecutors will tell you that it is not difficult to obtain an indictment. So if we select persons first to investigate, and then look for crimes, we will probably find them. That is one of the difficult things about the independent counsel law, because in many respects, it selects an individual, and then it creates an office to investigate them.

As Justice Scalia said in dissenting in the Supreme Court decision on this law, "how frightening it must be to have an independent prosecutor created just to investigate you and to be permitted to investigate you until that person is no longer investigated in investigating you." How frightening that must be, and frightening that is to the people that are being investigated.

That power is compounded by the fact that the independent counsel has unlimited time, an unlimited budget, and unlimited resources. The independent counsel has all the power of the Department of Justice, and yet is subject to none of the constraints that prosecutors in the Department of Justice are subject to. There is no other official in the executive branch of Government that has unlimited budget, unlimited time, an unlimited resources to do something. So we have created an unprecedented office.

It is not criticism of Judge Walsh, although I have been critical of that investigation, but the institution that we have created causes things to spin out of control. When there are no constraints, they tend to go on forever.

President Reagan was in office for 8 years. Judge Walsh's independent counsel investigation lasted about that long. He held office longer than any member of the Reagan administration Cabinet except for Secretary Pierce. He held office longer than every single Attorney General of the United States in our history, with the exception of one. He served during three Presidents of the United States, Reagan, Bush, and Clinton. His investigation spanned the tenure of four Attorneys General, Meese, Thornburgh, Barr, and Reno. His investigation lasted longer than World War II.

These investigations can go on and on and on, and they have no constraints. That is compounded by other factors. The threshold for the appointment of an independent counsel is very, very low. The idea that an independent counsel must be appointed and this prolonged nightmare will begin for subjects of an independent counsel investigation, is based upon an Attorney General's determination that there exists a reasonable ground to investigate further. Unless the Attorney General can find that there is no reasonable basis to investigate, the Attorney General must seek the appointment of an independent counsel. The process thus begins.

I won't go on any further, because I know that you have my testimony before you, except to say that because the public has become so attracted to this statute, I doubt that it will be repealed, and I suspect that it will continue to exist. If it does continue to exist, I join the other members of this panel in suggesting that there are certain changes that should be made.

I do believe that the number of individuals covered by the statute ought to be narrowed to a few officials. It should not just be a whole range of top governmental officials. If the concern is conflicts

of interest concerning the Attorney General or the President of the United States, then it should be narrowed accordingly.

The threshold should be made considerably higher, more as it is with other crimes. There should have to be substantial evidence that a crime has actually been committed before this entire office is created.

I agree with the other panelists, that the list of the crimes ought to be narrowed. It shouldn't be every statute in the entire Federal Criminal Code.

The jurisdiction of the independent counsel should be narrowly specified at the outset, and there should be only very, very limited occasions when it can be expanded, because that leads to investigations of witnesses and associates and friends and colleagues, and it tends to go on and on.

I do agree that it should be a full time job. This country—the people being investigated, including now the President of the United States and the people of the United States, deserve an investigation that is being conducted full-time by the people conducting the investigation so that it can be brought to a conclusion as rapidly as possible.

I do think that the reporting requirement leads to abuses—the independent counsel court that examined Judge Walsh's report stated that that report was full of accusations and innuendos that individuals who had either not been indicted or tried, or whose convictions had been overturned, had nonetheless committed crimes. That is an inappropriate process. Normal prosecutors do not render reports stating that individuals had committed crimes when their targets have not had a chance to vindicate themselves through the process.

I think that there are certain amendments that should be made to the fee provisions. It is extremely expensive for an individual who is subject to one of these investigations. The fees, if they are paid at all, are only paid if they are not indicted. Even if they were indicted and acquitted, they receive no fee reimbursement. The court will not reimburse for many of the services that are actually performed by lawyers and necessary to be performed by lawyers for independent counsel investigating subjects.

Dealing with the press, for example. If your client has been—is being investigated and the independent counsel puts out press releases and has a public office that leaks these charges, someone has to respond to those charges or reputational injury can be permanent. The independent counsel court does not reimburse the lawyers for performing those services.

The reimbursement when it comes, comes long after the investigation is over. Since the independent counsel court does not reimburse all of the fees, and since it comes so late, the amount of recovery by the attorneys is substantially below what they would receive if they were doing work for anyone else.

That provides a substantial disincentive to represent someone who is subject to an independent counsel investigation, because they cannot individually afford the cost of these investigations.

Thank you for your time. I appreciate having had the opportunity to testify.

[The prepared statement of Mr. Olson follows:]

PREPARED STATEMENT OF THEODORE B. OLSON, PARTNER, GIBSON, DUNN & CRUTCHER

INTRODUCTION

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE ON CRIME OF THE HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, MY NAME IS THEODORE B. OLSON. I AM A PARTNER WITH THE LAW FIRM OF GIBSON, DUNN & CRUTCHER IN WASHINGTON, D.C.

THANK YOU FOR THE OPPORTUNITY TO TESTIFY BEFORE YOUR COMMITTEE IN CONNECTION WITH THE INDEPENDENT COUNSEL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT, 28 U.S.C. SECTION § 591, *ET SEQ.*

I HAVE HAD EXTENSIVE PERSONAL EXPERIENCE FROM A VARIETY OF VANTAGE POINTS OVER THE PAST 15 YEARS WITH THE INDEPENDENT COUNSEL LAW. AS ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL COUNSEL IN THE UNITED STATES DEPARTMENT OF JUSTICE DURING THE YEARS 1981-1984, I PROVIDED LEGAL ADVICE TO ATTORNEY GENERAL WILLIAM FRENCH SMITH AND OTHER JUSTICE DEPARTMENT OFFICIALS CONCERNING THE INTERPRETATION AND IMPLEMENTATION OF THE LAW IN THE EARLY DAYS OF ITS OPERATION. DURING THAT SAME PERIOD, MY OFFICE RENDERED LEGAL ADVICE AND SUBMITTED FORMAL LEGAL OPINIONS CONCERNING THE LAW TO INDEPENDENT COUNSELS WHO WERE THEN CONDUCTING INVESTIGATIONS. I ALSO PARTICIPATED IN PREPARING TESTIMONY SETTING FORTH THE POSITION

OF THE DEPARTMENT OF JUSTICE ON PROPOSED AMENDMENTS TO THE ACT AS IT WAS BEING RE-AUTHORIZED IN 1982.

AFTER LEAVING THE DEPARTMENT OF JUSTICE, I HAD THE UNCOMFORTABLE EXPERIENCE OF BEING THE SUBJECT OF A LENGTHY INDEPENDENT COUNSEL INVESTIGATION WHICH INCLUDED A CHALLENGE TO THE CONSTITUTIONALITY OF THE LAW IN THE UNITED STATES SUPREME COURT (*MORRISON V. OLSON*, 487 U.S. 654 (1988)). ALTHOUGH THAT INVESTIGATION ENDED, I AM PLEASED TO SAY, WITH A REPORT EXONERATING ME AND A JUDICIAL DECISION REIMBURSING ME FOR A SUBSTANTIAL PORTION OF MY LEGAL FEES, IT IS NOT AN EXPERIENCE THAT I WOULD WANT TO REPEAT. AS JUSTICE SCALIA EXPLAINED IN DISSENTING FROM THE SUPREME COURT DECISION UPHOLDING THE CONSTITUTIONALITY OF THIS LAW: "HOW FRIGHTENING IT [IS] TO HAVE YOUR OWN INDEPENDENT COUNSEL AND STAFF APPOINTED WITH NOTHING ELSE TO DO BUT TO INVESTIGATE YOU UNTIL INVESTIGATION IS NO LONGER WORTHWHILE." 487 U.S. AT 732.

I HAVE ALSO BEEN COUNSEL TO SEVERAL SUBJECTS OF INDEPENDENT COUNSEL INVESTIGATIONS INCLUDING FORMER PRESIDENT RONALD REAGAN AND FORMER WHITE HOUSE CHIEF OF STAFF DONALD REGAN IN CONNECTION WITH THE IRAN-CONTRA INDEPENDENT COUNSEL INVESTIGATION CONDUCTED BY JUDGE WALSH, AND STEVEN BERRY, A SUBJECT OF MR. DIGENOVA'S RECENTLY COMPLETED "CLINTON PASSPORT FILE" INDEPENDENT COUNSEL INVESTIGATION. I ALSO REPRESENT, IN A LIMITED

CAPACITY, A WITNESS IN THE INDEPENDENT COUNSEL INVESTIGATION OF THE CLINTON ADMINISTRATION BEING CONDUCTED BY KENNETH STARR.

AS A RESULT OF THESE EXPERIENCES, WITH THE INDEPENDENT COUNSEL LAW, I AM HIGHLY CRITICAL OF THE LAW AND ITS OPERATION. ALTHOUGH HONORABLE AND CONSCIENTIOUS INDIVIDUALS HAVE SERVED AS INDEPENDENT COUNSEL, INCLUDING PERSONS FOR WHOM I HAVE HIGH PERSONAL REGARD, THE NATURE OF THE RESPONSIBILITY THAT THEY UNDERTAKE WHEN ACCEPTING SUCH AN ASSIGNMENT AND THE STRUCTURE OF THE INDEPENDENT COUNSEL LAW ITSELF LEAD TO INJUSTICES THAT, IN MY JUDGMENT, FAR OUTWEIGH THE LIMITED BENEFITS OF THE LAW. I THEREFORE BELIEVE THAT THE LAW SHOULD BE REPEALED. BECAUSE YOUR TIME IS LIMITED, I WILL MENTION ONLY A FEW OF MY MANY OBJECTIONS TO THE LAW.

AS ATTORNEY GENERAL (AND LATER SUPREME COURT JUSTICE) ROBERT JACKSON EXPLAINED IN 1940 TO THE SECOND ANNUAL CONFERENCE OF UNITED STATES ATTORNEYS, A FEDERAL "PROSECUTOR HAS MORE CONTROL OVER LIFE, LIBERTY, AND REPUTATION THAN ANY OTHER PERSON IN AMERICA." HE OR SHE CAN ORDER PROLONGED AND INTRUSIVE INVESTIGATIONS, SUBPOENA DOCUMENTS, OBTAIN SEARCH WARRANTS, SECURE APPROVAL TO TAP TELEPHONES, COMPEL PERSONS TO TESTIFY BEFORE GRAND JURIES, DAMAGE REPUTATIONS, FORCE PEOPLE TO GO TO TRIAL, DRIVE PERSONS INTO BANKRUPTCY AND GENERALLY DISRUPT OR DAMAGE LIVES. ANY SUBJECT OF A CRIMINAL INVESTIGATION, ESPECIALLY IF IT IS CONDUCTED, IN PART, IN PUBLIC, SUFFERS SIGNIFICANT AND ESSENTIALLY IRREPARABLE DAMAGE

SIMPLY BY VIRTUE OF THE INVESTIGATION ITSELF AND ITS MOST BASIC CONSEQUENCES. WHILE A PROSECUTOR MAY BE AND USUALLY IS AN IMPORTANT FORCE FOR JUSTICE, AS ATTORNEY GENERAL JACKSON EXPLAINED, IF "HE ACTS FROM MALICE OR OTHER BASE MOTIVES, HE [MAY BE] ONE OF THE WORST [FORCES IN OUR SOCIETY]."

BECAUSE A PROSECUTOR HAS SUCH AWESOME POWER, IT IS ESSENTIAL THAT THAT POWER BE EXERCISED WITH RESTRAINT AND WITHIN A SYSTEM OF INSTITUTIONAL CHECKS. IT IS IMPORTANT, FOR EXAMPLE, THAT PROSECUTORS INVESTIGATE CRIMES AND NOT TARGET INDIVIDUALS FOR INVESTIGATION TO SEE WHETHER A CRIME MAY BE FOUND. ANY ONE OF US WOULD BE VULNERABLE IF A PROSECUTOR WERE TO BE GIVEN UNLIMITED TIME AND RESOURCES TO ASCERTAIN WHETHER WE HAD FILED A DEFECTIVE TAX RETURN, VIOLATED AN ENVIRONMENTAL LAW OR FILLED OUT SOME GOVERNMENT FORM WITH INSUFFICIENT ACCURACY OR DETAIL. NEARLY EVERYONE HAS DONE SOMETHING THAT MIGHT VIOLATE SOME LAW, AND MOST PROSECUTORS WILL ADMIT THAT IT IS NOT HARD TO CONVINCE A GRAND JURY TO INDICT. THE PROBLEM WITH "SPECIAL PROSECUTORS," (A TERM THAT IS CERTAINLY MORE ACCURATE THAN THE EUPHEMISM "INDEPENDENT COUNSEL") IS THAT THEY ARE APPOINTED TO INVESTIGATE PERSONS MORE THAN CRIMES AND REGARDLESS OF THE SCOPE OF THEIR JURISDICTION, THAT IS WHAT THEY GENERALLY WIND UP DOING.

TO QUOTE ATTORNEY GENERAL JACKSON AGAIN, "THE GREATEST DANGER OF ABUSE OF PROSECUTING POWER LIES" IN THOSE SITUATIONS

WHERE A PERSONS IS SELECTED FOR INVESTIGATION AND THE PROSECUTOR THEN LOOKS FOR AN OFFENSE." YET THAT IS ESSENTIALLY HOW THE INDEPENDENT COUNSEL LAW OPERATES IN PRACTICE.

THE INJUSTICE CREATED BY TARGETING INDIVIDUALS TO INVESTIGATE IS COMPOUNDED BY THE FACT THAT THE THRESHOLD TO START AN INVESTIGATION UNDER THE INDEPENDENT COUNSEL LAW IS A GREAT DEAL LOWER THAN FOR OTHER INVESTIGATIONS. BECAUSE A CRIMINAL INVESTIGATION OF AN INDIVIDUAL CAN BE SUCH AN INTRUSIVE AND DAMAGING EPISODE, CRIMINAL INVESTIGATIONS ARE NOT NORMALLY COMMENCED ABSENT A RELATIVELY STRONG BASIS FOR BELIEVING THAT A CRIME HAS BEEN COMMITTED. THAT IMPORTANT BARRIER TO THE LAUNCHING OF AN INVESTIGATION IS VIRTUALLY ELIMINATED IN THE CASE OF THE INDEPENDENT COUNSEL LAW. UNDER THAT LAW, THE ATTORNEY GENERAL *"SHALL"* ORDER A PRELIMINARY INVESTIGATION WHENEVER SHE RECEIVES *"INFORMATION SUFFICIENT TO CONSTITUTE GROUNDS TO INVESTIGATE"* WHETHER ANY OF THE OFFICIALS DESIGNATED BY THE STATUTE *"MAY HAVE VIOLATED"* ANY BUT THE MOST TRIVIAL OF FEDERAL LAWS. UNLESS THE ATTORNEY GENERAL DETERMINES, DURING A BRIEF PRELIMINARY INVESTIGATION, THAT *"THERE ARE NO REASONABLE GROUNDS TO BELIEVE THAT FURTHER INVESTIGATION IS WARRANTED,"* THE ATTORNEY GENERAL *"SHALL"* APPLY FOR THE APPOINTMENT OF AN INDEPENDENT COUNSEL.

THIS IS AN IMPOSSIBLY LOW STANDARD. IT SETS IN MOTION THE APPOINTMENT OF AN INDEPENDENT COUNSEL, AND VIRTUALLY ASSURES THAT

THERE WILL BE A LENGTHY, PUBLIC, COSTLY AND DAMAGING INVESTIGATION, PREDICATED ON THE THINNEST OF ALLEGATIONS OF WRONGDOING UNLESS THE ATTORNEY GENERAL CAN DETERMINE THAT THERE IS "NO REASONABLE GROUND TO" INVESTIGATE FURTHER.

THAT IS ALMOST LIKE HAVING TO PROVE THAT YOU ARE INNOCENT BEYOND A REASONABLE DOUBT. THE LAW THUS EXPOSES THE HIGHEST OFFICIALS IN THE EXECUTIVE BRANCH, INCLUDING THE ONLY TWO PERSONS (THE PRESIDENT AND VICE PRESIDENT) ELECTED BY THE ENTIRE NATION, TO A POTENTIALLY DEVASTATING AND DEBILITATING CRIMINAL INVESTIGATION BASED UPON ALLEGATIONS THAT MAY LACK NO SUBSTANCE BUT WHICH CANNOT BE RULED OUT AS A POTENTIAL AVENUE OF INVESTIGATION. IT SEEMS IRONIC AS WELL AS UNJUST THAT WE SUBMIT OUR MOST TRUSTED PUBLIC OFFICIALS TO A VASTLY GREATER EXPOSURE TO A CRIMINAL INVESTIGATION THAN ANY OTHER CITIZEN IN THE NATION.

THE APPOINTMENT OF THE INDEPENDENT COUNSEL IS THE BEGINNING OF A PROLONGED NIGHTMARE FOR THE SUBJECT OF THE INVESTIGATION. ONCE THE INDEPENDENT COUNSEL IS APPOINTED, THE INVESTIGATION THAT FOLLOWS IS ALMOST INVARIABLY MORE LENGTHY, INTRUSIVE, BROAD, PUBLIC AND INTENSE THAN NORMAL JUSTICE DEPARTMENT INVESTIGATIONS. LAWYERS MUST BE HIRED, FRIENDS AND ASSOCIATES WILL BE SUBPOENAED FOR TESTIMONY, AND EXTRAORDINARILY BROAD CATEGORIES OF DOCUMENTS MUST BE PRODUCED.

ORDINARY PROSECUTORS ARE FORCED TO ALLOCATE LIMITED RESOURCES TO THE MOST SERIOUS OF CRIMES, AND TO MOVE ON TO OTHER COMPELLING CONCERNS IF AN INVESTIGATION BECOMES TOO LENGTHY. THESE RESTRAINTS ARE VALUABLE INSTITUTIONAL CHECKS WHICH PREVENT MOST PROSECUTORS FROM INVESTIGATING TRIVIAL OR UNINTENDED OR HARMLESS CRIMES, OR FROM PURSUING A TARGET, HOWEVER DESERVING OF INVESTIGATION, ENDLESSLY. UNFORTUNATELY, THE INDEPENDENT COUNSEL LAW OVERRIDES MOST OF THE NORMAL CONSTRAINTS ON THE POWERS OF PROSECUTORS. NEITHER THEIR RESOURCES NOR THEIR TIME ARE LIMITED. UNLIKE ANY OTHER PROSECUTOR, OR ANY OTHER GOVERNMENT AGENCY, THEY HAVE A BLANK CHECK FROM CONGRESS TO SPEND WHATEVER FUNDS THEY DEEM APPROPRIATE, TO HIRE AS MANY ASSISTANT PROSECUTORS THEY MAY WISH, TO USE AS MANY FBI AGENTS OR OTHER GOVERNMENT HELP THEY MAY WANT, AND TO EXERCISE EVERY POWER GIVEN TO THE ATTORNEY GENERAL OF THE UNITED STATES FOR AS LONG AS THEY WISH. AS WOULD ANY INDIVIDUAL WHO IS GIVEN UNRESTRAINED POWER, MONEY, AND TIME, THE INDEPENDENT COUNSEL WILL ALMOST INVARIABLY USE THAT DISCRETION TO INTERVIEW EVERY WITNESS, EXAMINE EVERY DOCUMENT AND TURN OVER EVERY PEBBLE, HOWEVER INSIGNIFICANT.

THE INSTITUTIONAL PRESSURES ON INDEPENDENT COUNSEL VIRTUALLY ASSURE THAT NORMAL LIMITATIONS WILL BE EXCEEDED. THE DESIGNATION OF AN INDEPENDENT COUNSEL TO INVESTIGATE SOMEONE IS LIKE ISSUING A HUNTING LICENSE WITH THE NAME OF THE TARGET PRINTED

ON TO THE LICENSE. THE PROSECUTOR IS THEN ACCORDED ALL OF THE POWER AND RESOURCES OF THE FEDERAL GOVERNMENT TO "HUNT" THAT TARGET AS A RESULT, ALL MANNER OF PSYCHOLOGICAL FORCES ENCOURAGE A LENGTHY, EXHAUSTIVE INVESTIGATION. UNFORTUNATELY, THE VIRTUALLY IRRESISTIBLE TEMPTATION IS TO BRING HOME THE GAME WHOSE NAME IS ON THE LICENSE, OR TO DEMONSTRATE AT THE END THAT NO EFFORT WAS SPARED IN ATTEMPTING TO FIND A GROUND FOR DOING SO.

THE INDEPENDENT COUNSEL'S JURISDICTION IS GENERALLY DEFINED BY THE APPOINTING COURT IN BROAD TERMS, WITH AN ADDED PROVISO THAT THE PROSECUTOR CAN INVESTIGATE OTHER PERSONS AND ANY OTHER ALLEGED LAW VIOLATION UNCOVERED DURING THE INVESTIGATION. THIS GIVES THE PROSECUTOR NOT ONLY BROAD POWER OVER HIS SUBJECT, BUT THE POWER TO PUT INVESTIGATIVE PRESSURE ON FRIENDS, ASSOCIATES AND RELATIVES OF THE TARGET. AND THE PROSECUTOR CAN INVESTIGATE WHETHER WITNESSES HAVE BEEN TRUTHFUL OR COOPERATIVE, THUS PUTTING PRESSURE ON THEM TO HELP THE PROSECUTOR BUILD A CASE AGAINST THE TARGET. OF COURSE, REGULAR PROSECUTORS HAVE SIMILAR AUTHORITY, BUT THEY HAVE NEITHER THE SAME PRESSURE TO "BRING IN" THE TARGET NAMED ON A HIGHLY SPECIFIC HUNTING LICENSE, BECAUSE THEY, UNLIKE INDEPENDENT COUNSEL, CAN ALWAYS MOVE ON TO OTHER TARGETS, NOR THE UNLIMITED RESOURCES THAT ALLOW THEM TO FOCUS SO INTENSELY FOR SO LONG ON SECURING THE PROSECUTION OF THE IDENTIFIED TARGET.

HISTORY HAS SHOWN THAT BECAUSE THERE ARE NO BUDGETARY OR TIME CONSTRAINTS ON INDEPENDENT COUNSELS, THEY WILL TYPICALLY INVESTIGATE BROADLY, AT GREAT LENGTH AND IN METICULOUS DETAIL. NO INDEPENDENT COUNSEL WANTS TO BE ACCUSED OF OVERLOOKING ANYTHING. POLITICAL OPPONENTS OF THE TARGETED PERSON WILL BRING HUGE PRESSURE ON THE INDEPENDENT COUNSEL TO TRACK DOWN EVERY RUMOR, ALLEGATION OR SUSPICION. AND THE INDEPENDENT COUNSEL HAS NO EXCUSE, EXCEPT DISCRETION, NOT TO INVESTIGATE EVERYTHING. THUS, INDEPENDENT COUNSEL INVESTIGATIONS GET LONGER AND LONGER. THE FIRST TWO SUCH INVESTIGATIONS WERE COMPLETED IN MONTHS. THEIR LENGTH IS NOW MEASURED IN YEARS.

AS A CONSEQUENCE OF ALL THESE FACTORS, THE DAMAGE TO TARGETS OF INDEPENDENT COUNSEL INVESTIGATIONS IS INVARIABLY IMMENSE EVEN WHERE THERE IS NO INDICTMENT. THEY INCUR ENORMOUS COSTS. THEIR LIVES ARE DISRUPTED FOR LONG PERIODS. AND, IF THEY ARE A TOP GOVERNMENT OFFICIAL, THEIR ABILITY TO PERFORM THEIR JOB IS INEVITABLY IMPAIRED. IF THEY HAVE LEFT THE GOVERNMENT, THEIR PRIVATE LIVES ARE SERIOUSLY DISLOCATED. NO ONE SURVIVES AN INVESTIGATION WITHOUT SOME SERIOUS SCARS. AND EVEN IF A SUBJECT IS NOT INDICTED, THE FINAL REPORT IS ALMOST INVARIABLY CRITICAL OF THE SUBJECT IN SOME FASHION. AND ATTORNEYS FEES, EVEN FOR THE UNINDICTED, ARE SELDOM, IF EVER, REIMBURSED IN FULL.

INTERIM REPORTS TO CONGRESS BY INDEPENDENT COUNSEL, AUTHORIZED BY THE LAW, HAVE BEEN ABUSED TO MAKE ALLEGATIONS AND ASSERTIONS REGARDING THE SUBJECTS, OR TARGETS OF INVESTIGATIONS – SOMETHING WHICH REGULAR PROSECUTORS ARE BOUND NOT TO DO. AND THE FINAL REPORT REQUIREMENT HAS TURNED INTO AN EXCUSE TO FILE LONG EXHAUSTIVE EXPOSITIONS WHICH RATIONALIZE THE INVESTIGATION, DESCRIBE EVERY FACT INVESTIGATED, WITNESS INTERVIEWED AND DOCUMENT EXAMINED, OFFER OPINIONS REGARDING AND/OR PRONOUNCE JUDGMENTS ON THE INDIVIDUALS INVESTIGATED, AND GENERALLY MAKE THE INDEPENDENT COUNSEL LOOK GOOD. THESE REPORTS MAY HAVE SOME BENEFITS, AS WHEN AN INDEPENDENT COUNSEL EXPLAINS THAT THE PERSONS WHO HAVE BEEN UNDER A CLOUD FOR YEARS DID NOT VIOLATE ANY LAW. BUT THAT BENEFIT IS OFTEN OUTWEIGHED BY JUDGMENTAL STATEMENTS IN REPORTS PRONOUNCING THAT PERSONS WHO HAD NOT BEEN PROSECUTED, OR WHO HAD BEEN PARDONED, OR WHOSE CONVICTIONS HAD BEEN OVERTURNED, HAD NONETHELESS COMMITTED CRIMES, FAILED TO COOPERATE, HAD VIOLATED THE "SPIRIT" OF THE LAW, OR HAD ACTED IMPROPERLY IN SOME FASHION. THESE REPORTS OFTEN CONTAIN ASSERTIONS BASED ON OUT-OF-CONTEXT FRAGMENTS OF SECRET GRAND JURY TESTIMONY – IMPOSSIBLE FOR ANYONE TO REFUTE.

THE POWER TO RESPOND TO THESE REPORTS GIVEN BY THE LAW TO PERSONS MENTIONED IN THEM HAS VERY LITTLE VALUE. NO ONE READS THESE RESPONSES. WHAT THE PROSECUTOR SAYS IS NEWS, ESPECIALLY IF IT IS

GRATUITOUS SLANDER OR INSULT. THE RESPONSES RECEIVE LITTLE ATTENTION.

THE FEE REIMBURSEMENT MECHANISMS OF THE LAW ARE WOEFULLY INADEQUATE. THE SUBJECT CANNOT EVEN APPLY FOR FEES IF HE HAS BEEN INDICTED. GIVEN THE EASE WITH WHICH A PROSECUTOR CAN INDICT, THAT GIVES THE PROSECUTOR ENORMOUS LEVERAGE OVER THE SUBJECT. AND THE INDEPENDENT COUNSEL COURT SUBMITS ATTORNEYS FEES APPLICATIONS FOR COMMENTS TO THE INDEPENDENT COUNSEL AND TO THE DEPARTMENT OF JUSTICE, THUS REQUIRING A SUBJECT TO REVEAL CONFIDENTIAL INFORMATION TO HIS ADVERSARY AND THE GOVERNMENT IF HE EXPECTS TO BE REIMBURSED. AND THE INDEPENDENT COUNSEL ACTUALLY HAS THE POWER TO OPPOSE PAYMENT OF ATTORNEYS FEES, GIVING HIM EVEN MORE POWER OVER THE SUBJECT OF HIS PROSECUTION, ESPECIALLY WITH RESPECT TO ANY SUBJECT -- OR ATTORNEY -- WHO DARES CRITICIZE THE INDEPENDENT COUNSEL OR HIS WORK. MOST FREQUENTLY, THE COURT AWARDS ONLY A PORTION OF THE FEES INCURRED AND ONLY THEN WELL AFTER THE INVESTIGATION IS OVER. IRONICALLY, ALTHOUGH THE INVESTIGATION TYPICALLY GENERATES ENORMOUS ADVERSE PUBLICITY TO THE SUBJECT OF THE INVESTIGATION AND THE LAW ALLOWS THE INDEPENDENT COUNSEL TO HIRE PRESS AGENTS AND PAYS HIM FOR DEALING WITH THE PRESS, THE COURT WILL NOT REIMBURSE THE TARGET'S LAWYER FOR HIS NECESSARY DEALINGS WITH THE PRESS IN RESPONSE. ATTORNEYS ARE THEREFORE OFTEN PAID LESS THAN 50 CENTS ON THE DOLLAR, ESPECIALLY

WHEN FEE AWARDS ARE DISCOUNTED FOR THE LENGTH OF TIME FROM WHEN THE SERVICES ARE RENDERED TO THE DATE OF FEE RECOVERY. THIS PROVIDES A SUBSTANTIAL DISINCENTIVE TO REPRESENT ANYONE SUBJECT TO THIS LAW.

I SEE NO NEED FOR AN INDEPENDENT COUNSEL LAW. I SEE NO VIRTUE IN HAIR-TRIGGERED, INTRUSIVE, PROLONGED, PUBLIC INVESTIGATIONS OF OUR HIGHEST EXECUTIVE BRANCH OFFICIALS. OUR CONSTITUTION VESTED ALL EXECUTIVE POWER IN THE PRESIDENT. THE DEPARTMENT OF JUSTICE IS FILLED WITH DEDICATED CAREER OFFICIALS WHO CAN BE TRUSTED TO INVESTIGATE REAL CRIME - THEY DO SO THOROUGHLY AND COMPETENTLY EVERY DAY UNDER REPUBLICAN AND DEMOCRAT PRESIDENTS. AND THEY INVESTIGATE GOVERNMENT CORRUPTION ALL THE TIME. IT IS VERY UNLIKELY THAT POLITICAL APPOINTEES CAN STIFLE OR SIDETRACK A LEGITIMATE INVESTIGATIONS IN THIS DAY AND AGE. THESE CAREER OFFICIALS VALUE THEIR INTEGRITY TOO MUCH TO ALLOW THAT TO HAPPEN. AND IF SUCH AN EFFORT IS MADE, THERE IS ALWAYS THE POSSIBILITY OF A LEAK TO THE PRESS OR TO CONGRESS WHENEVER A POLITICAL APPOINTEE ATTEMPTS TO IMPEDE, AN INVESTIGATION OR COVER UP A CRIME.

IF THE PRESIDENT HIMSELF MUST BE INVESTIGATED, PRESSURES FROM CONGRESS AND THE PRESS WILL ASSURE THAT IT IS DONE. AND CONGRESS ALSO POSSESSES THE IMPEACHMENT POWER, WHICH THE FRAMERS OF OUR CONSTITUTION DESIGNED TO BE THE PROCESS BY WHICH CORRUPT OFFICIALS, INCLUDING PRESIDENTS, COULD BE REMOVED. THEY DID NOT INTEND, AND WOULD NOT HAVE SUPPORTED, "INDEPENDENT" PROSECUTORS

WHO, IF ANYTHING, GIVE CONGRESS AN EXCUSE NOT TO EXERCISE ITS RESPONSIBILITY.

OF COURSE OUR CONSTITUTIONAL SYSTEM IS NOT FLAWLESS OR FOOLPROOF. BUT WE HAVE A FREE PRESS AND REGULAR ELECTIONS WHICH PROVIDE ADDITIONAL STRUCTURAL SAFEGUARDS. AND IN OUR EFFORT TO MAKE OUR SYSTEM PERFECT, IN MY JUDGMENT, WE HAVE INTRODUCED MORE INJUSTICE INTO THE SYSTEM THAN WE HAVE REMOVED.

I RECOGNIZE, HOWEVER, THAT CONGRESS AND THE AMERICAN PUBLIC HAVE BECOME ACCUSTOMED TO THE INDEPENDENT COUNSEL LAW AND MANY IN THE MEDIA SEEM TO VALUE THE NEWS WHICH THE OPERATION OF THE LAW GENERATES. THUS, THERE IS A GREAT DEAL OF OPPOSITION TO ITS REPEAL. IF THE LAW CANNOT BE ELIMINATED, I SUGGEST THAT ITS PROVISIONS BE AMENDED AS FOLLOWS:

1. THERE SHOULD BE A SUBSTANTIAL NARROWING OF THE RANGE OF "COVERED PERSONS."
2. THE TRIGGER FOR SEEKING AN APPOINTMENT OF AN INDEPENDENT COUNSEL SHOULD BE CONSIDERABLY HIGHER THAN "REASONABLE GROUNDS TO BELIEVE THAT FURTHER INVESTIGATION IS WARRANTED."
3. THE LIST OF FEDERAL OFFENSES TO WHICH THE LAW APPLIES SHOULD BE SHARPLY LIMITED.
4. THE JURISDICTION OF THE INDEPENDENT COUNSEL SHOULD BE NARROWLY DEFINED, EXPANDED ONLY WHERE THERE IS

SUBSTANTIAL EVIDENCE THAT A CRIME HAS BEEN COMMITTED AND NOT EXPANDED TO COVER NEW TARGETS OR SUBJECTS EXCEPT IN VERY NARROW CIRCUMSTANCES.

5. AN INDEPENDENT COUNSEL SHOULD AGREE AT THE OUTSET THAT HIS OR HER RESPONSIBILITY WILL BE A FULL TIME ENGAGEMENT. WHILE IT MIGHT BE ARGUED THAT SOME INDEPENDENT COUNSEL INVESTIGATIONS WILL NOT REQUIRE A FULL TIME PROSECUTOR, THE TEMPTATIONS AND DISTRACTIONS OF A COMPETING LAW PRACTICE AND THE NEED FOR INDIVIDUALS BEING INVESTIGATED AND THE AMERICAN PUBLIC TO HAVE AN EXPEDITIOUS RESOLUTION TO THESE INVESTIGATIONS SUGGESTS TO ME THAT INDEPENDENT COUNSEL SHOULD WORK FULL TIME ON THEIR GOVERNMENT DUTIES UNTIL THE MISSION IS COMPLETED. FOR SOME INVESTIGATIONS, CAREER PROSECUTORS WHO ARE ALREADY GOVERNMENT EMPLOYEES COULD PERHAPS BE CONSIDERED FOR APPOINTMENT AS INDEPENDENT COUNSELS.
6. THE RIGHT TO FILE "INTERIM" REPORTS WITH CONGRESS AND THE RESPONSIBILITY TO FILE A FINAL REPORT SHOULD BE DELETED OR MATERIALLY NARROWED. THE INTERIM REPORT PROCESS IS NOT NECESSARY AND SIMPLY ALLOWS THE INDEPENDENT COUNSEL TO MAKE EXTRA-JUDICIAL AND IMMUNIZED STATEMENTS ABOUT A PENDING INVESTIGATION

THAT MAY BE DAMAGING TO THE SUBJECT OF AN INVESTIGATION. THE FINAL REPORT MAY BE USED UNFAIRLY TO STIGMATIZE PERSONS WHO HAVE NOT BEEN CHARGED WITH COMMITTING CRIMES. OR IT MAY BE USED TO EXPRESS JUDGMENTS ABOUT SUBJECTS OR WITNESSES BASED ON SECRET GRAND JURY TESTIMONY THAT ARE UNFAIR TO THE PERSONS MENTIONED AND DIFFICULT TO REFUTE BECAUSE BASED UPON SOURCES NOT AVAILABLE TO THE PERSONS COMMENTED UPON. MOREOVER, THESE REPORTS HAVE BECOME LENGTHY GOVERNMENT-FINANCED, SELF-CONGRATULATORY ENCYCLOPEDIAS. MR. WALSH'S REPORT WAS 565 PAGES AND SEVERAL HUNDRED THOUSAND WORDS. ASIDE FROM A SIMPLE STATEMENT THAT CERTAIN PERSONS HAD BEEN CONVICTED OR ACQUITTED OR NOT PROSECUTED, THESE REPORTS DO VASTLY MORE DAMAGE THAN GOOD.

7. AN INDEPENDENT COUNSEL SHOULD AGREE AND SIGN A CONTRACT WITH THE GOVERNMENT TO THE EFFECT THAT HE OR SHE WILL RECEIVE NO COMPENSATION WITH RESPECT TO THEIR SERVICE AS AN INDEPENDENT COUNSEL EXCEPT FROM THE UNITED STATES GOVERNMENT. WHILE THIS WILL NOT PRECLUDE INDEPENDENT COUNSEL FROM GIVING SPEECHES OR LECTURES, OR OTHERWISE WRITING ABOUT THEIR EXPERIENCES, IT WILL PRECLUDE THEM FROM PROFITING FROM

A BOOK ABOUT THEIR EXPLOITS. THIS SHOULD REMOVE THE TEMPTATION FOR INDEPENDENT COUNSEL FROM HAVING ONE EYE ON DISCHARGING THEIR PUBLIC DUTIES AND ANOTHER ON THE BOOK THEY MIGHT WRITE GLORIFYING THEIR OWN ADVENTURES. THIS COMMITMENT SHOULD ALSO BE IMPOSED ON ANY PERSON ON THE INDEPENDENT COUNSEL'S STAFF.

8. ATTORNEYS FEES PROVISIONS SHOULD BE AMENDED TO INCLUDE INTERIM PAYMENTS, TO DELETE INPUT REGARDING FEE AWARDS FROM THE INDEPENDENT COUNSEL AND THE DEPARTMENT OF JUSTICE, TO COVER INDICTED BUT UNCONVICTED SUBJECTS, AND TO COVER ALL TASKS REASONABLY UNDERTAKEN BY A SUBJECT'S LAWYER, INCLUDING DEALING WITH THE PRESS.

9. THE INDEPENDENT COUNSEL LAW SHOULD NOT BE EMPLOYED IN A MANNER THAT ALLOWS CONGRESS, FOR POLITICAL REASONS, TO WEAKEN THE POWERS OF THE PRESIDENCY BY AUTHORIZING INVESTIGATIONS OF SUBORDINATES OF THE PRESIDENT FOR THE PERFORMANCE OF TASKS FUNDAMENTAL TO THE PRESIDENT'S CONSTITUTIONAL DUTIES EXCEPT WHERE THERE IS SUBSTANTIAL EVIDENCE THAT A CRIME HAS BEEN COMMITTED IN PERFORMING THOSE DUTIES.

CONCLUSION

THE INDEPENDENT COUNSEL LAW IS A MISGUIDED EFFORT TO IMPROVE ON OUR CONSTITUTION. UNFORTUNATELY THE DAMAGE BEING DONE TO INDIVIDUALS AND TO OUR INSTITUTIONS OF GOVERNMENT BY THIS WELL-INTENDED BUT WOEFULLY MISGUIDED LAW, AND ITS ENORMOUS COSTS, FAR OUTWEIGH ITS EXTREMELY LIMITED BENEFITS.

Mr. MCCOLLUM. You are quite welcome, Mr. Olson.

Mr. diGenova, and I did get it right that time. I want to be sure that you have a fair opportunity to present your testimony. We're going to have a vote in about 2 more minutes, we probably have a total of seven now. Would you prefer to have us take our break or do you want to go forward now?

Mr. DIGENOVA. I'm happy to do whatever the Chair would like.

Mr. MCCOLLUM. All right. Then we have about 7 minutes. Well, we have about 12 minutes before the vote actually. We have about 7 more minutes we could hear Mr. diGenova.

All right. If you wish to take the recess, let's take it and come back. We'll come back right afterwards. Then we'll have your complete testimony. We're in recess.

[Recess.]

Mr. MCCOLLUM. The Subcommittee on Crime will come to order. We took a recess for a vote and as I said earlier in the proceedings, we may get several of these votes today as we proceed through the farm bill on the floor. But in the process, we are back now in the middle of testimony of our panel. It is now time for Mr. diGenova to testify.

I continue to want to run over your name, Joe. I apologize. I know how it's pronounced. I even did it right the second try then. But we welcome you. You may summarize your testimony if you'd like. Your entire testimony will be admitted to the record without objection.

STATEMENT OF JOSEPH E. DIGENOVA, FORMER INDEPENDENT COUNSEL, AND PARTNER, DIGENOVA & TOENSING

Mr. DIGENOVA. Thank you, Mr. Chairman. It's a privilege to be here this morning. I thank the committee for its invitation. It is a privilege to be on this panel as well, with Mr. Olson, Judge Walsh, and Judge Mikva.

My concern about the statute, Mr. Chairman, has been recently reflected in some published comments that I have made about the operation of the statute and its pedigree. When Dr. Johnson said that patriotism was the last refuge of a scoundrel, I don't think he had heard of reform. The problem with most reforms, Mr. Chairman, is that while they are well intentioned, they usually hit some targets that they were not intended to hit, and do a lot of harm.

I don't think that any of us would disagree with the notion that given the constitutional crisis that confronted this country during Watergate, that the independent counsel or the use of a special prosecutor was appropriate. It was certainly very appropriate. I don't think anyone who ever has studied Watergate would think differently.

Similarly, I agree with Judge Mikva that the kind of constitutional crisis that confronted the dispute between the branches in Iran-Contra certainly was the type of constitutional confrontation which warranted the appointment of an independent counsel. I believe that Whitewater is an example of the kind of situation which requires the appointment.

But having said that, I think those three examples are decidedly different than the full array of circumstances in which an independent counsel has been utilized under the statute during its his-

tory of 20 years. I say that as a person who has been a U.S. attorney, been an independent counsel. I have been the chief counsel of a committee on the Hill and have conducted investigative hearings, and I have been a defense attorney.

Putting aside the question about anyone who was ever a prosecutor should be allowed to be a prosecutor unless they have been a defense attorney first, which I think is good training for how to use power wisely when you are a prosecutor, I think the people today who are concerned about the statute and its use have a reasonable basis for being concerned about it. Many of the comments that have been stated previously by the members of this panel, I would agree with wholeheartedly.

I want to particularly note that I think covering acts committed by individuals allegedly before they became Federal officials as covered persons, I think is a dangerous situation. I think it runs the risk of expanding the areas into which independent counsels can go unwisely. I think that it is not a bad thing for Congress to say we need to decide whether or not what started out as a very good idea and has some perfectly legitimate uses, both now and in the future, and has had in the past, ought to be limited somehow henceforth because of our experience under the statute.

I don't believe that Members of Congress sometimes understand what happens to people who are under investigation, even by congressional committees, may I say. I have represented people who have testified before investigating committees. It is a terrible experience for a person to be probed and targeted and investigated and subpoenaed, and have to hire a lawyer and spend a lot of money these days. Members of Congress have found that out recently in the House banking scandal, and a host of other investigations which have led to them having to spend money on legal fees that I'm sure they would have preferred to spend on other things. Many of them, however, have had campaign chests, which allow them legally to spend money if it's on legal fees if it's related to their official duties.

People who are caught up in these investigations, however, do not have the luxury of those deep pockets on occasion. I am very concerned about what happens to people who have to go out and hire attorneys. If this morning's Washington Post is any indication, some of the people in the Clinton administration have been so strained, not surprisingly, by the current Whitewater investigation, that they are forming legal defense funds under rules issued by the Office of Government Ethics, which permit them to do so.

I don't think it's a bad thing to ask ourselves whether or not that is a good state of affairs. I think it is probably regrettable that it had to take two different presidents. I guess it's now four different Presidents, maybe five or six, I don't know the total, and now from both parties having felt the sting of this statute, for us to ask the question about how we can appropriately limit the use of the statute.

I do not think there is any question that anyone who has looked at this statute believes that the threshold for its invocation must be raised higher. It is too low. It is too easy for an Attorney General to say my hands are tied.

A person who becomes a prosecutor has to be able to do two things, if nothing else. Indict when everybody tells you you shouldn't, when the evidence justifies it and the cause is just. And not indict, for the very same reasons. We must make it easier for an Attorney General to conclude that such an investigation in these cases would be unjust. It is unfair to ask people to come to this city, give up incomes, and then be subjected to investigations which can break them financially, emotionally, harm their families, and their family relationships. I have watched this as a defense attorney, as a U.S. attorney, and as an independent counsel.

I have to tell you, that when I was a younger lawyer—I am now 51, so maybe I'm not as young as I used to be—I didn't think about these things, but I do now, having watched people suffer through investigations. I conclude in that the guilty as well as the innocent, because not everybody who is investigated is innocent, and not everybody who is investigated is guilty, but they all suffer. We need to be concerned about that. We need to be concerned about the human suffering that goes on during these investigations.

When we have a trigger mechanism in this statute that is really a hair trigger, and makes it almost impossible—the current standard, let's face it, makes it almost impossible for an Attorney General not to authorize an ongoing preliminary investigation, which because they have no subpoena power to get documents and force people to talk to them, almost invariably will lead to a letter to the special court requesting the appointment of an independent counsel.

That is not a good state of affairs for public policy. I don't believe you can ask people to come to this city and take on high positions, and then have them basically arrive and just say, by the way, here's your special counsel waiting over here for you, the minute you step the wrong way. I think while I understand that for example, as Judge Walsh has indicated, and I certainly agree with, conduct by an official before they are sworn in should not ever be the subject of an independent counsel investigation, as far as I am concerned. The Justice Department is perfectly capable of handling that stuff.

Now it is true that given the theory of the statute, which is that an Attorney General can not investigate someone in his or her administration. The conflict still exists there. But it is not as great a conflict as if the person is being investigated for conduct which occurred while they were a secretary of whatever. That is a different kettle of fish.

But even then, even then, I am not sure that you ought to have independent counsels for every alleged transgression by a so-called covered person under this statute. Because for all the reasons that have been given, when you set this train in motion, nothing is going to stop it. Make no mistake about it, when you set an independent counsel in motion, if that court has appointed someone who really believes that they are honest about their work, no train is going to stop that independent counsel until he or she has thoroughly, and I underscore thoroughly, investigated the allegations which have been presented to them by the court. Nor should they stop, because the process either is real or it isn't. But it ought to

be reserved for those few instances, those very rare instances when the constitutional fabric of this Government is threatened.

I have dealt with the people in the Public Integrity Section since I was a young assistant U.S. attorney, over 25 years ago. They are the finest group of people in the Justice Department, along with a lot of other fine people. The Public Integrity Section of the Justice Department is perfectly capable, given the kind of insulation that they have had historically from political pressure, to investigate almost every case that has required the appointment of an independent counsel, with the exception of the three, which I think would warrant that, Watergate, Whitewater, and Iran-Contra. They are a fine group of people, properly supervised.

We have a gentleman here today, Jack Keeney, who has been a career Deputy Assistant Attorney General, has served as Acting Attorney General more times than I can count. I am perfectly comfortable with having the Department of Justice do most of the stuff.

Let me say to my—I am going to offend some of my Republican friends, who think that Congress ought to be covered by the independent counsel statute. I don't believe it should be, and I'll tell you why. I worked in the Senate. I worked for a very fine Senator named Charles Mathias, who was one of the finest men and lawyers I ever met in my life, and was a great mentor to me. We took some tough positions on civil rights and tough issues when he was running for the Senate. If this statute existed and covered Members of Congress, you think your campaigns are rough now? You wait until the opponent decides that he or she is going to start asking for independent counsels on every ethics transgression that is being alleged by a former staffer or somebody else.

I mean I certainly respect the ideas of those who think Congress ought to be covered because of the appearances of it, and underscoring the need for separation. But I think it would be a terrible mistake to cover Congress, because I don't think it is needed. I agree with Judge Mikva. I think the Justice Department is perfectly prepared to investigate Congress when the circumstances warrant it, and when the evidence is appropriate.

I would also like to address the question of the report that the independent counsel is required to give to the court. Let's all understand what this report is about. The report is required to be given to the court. It is not required to be given to the public. That is a decision that the court makes, about whether or not a final report should be made public. It is true that the court will frequently invite the independent counsel to opine on whether or not the report should be made public. But in the final analysis, it is the decision of the court as to whether or not reports should be issued.

Let us underscore something, because it is frequently forgotten. The report requirement of the independent counsel statute, which allows the court to make it public, is inconsistent with 200 years of American jurisprudence. Generally, prosecutors do not issue reports about their work. They either indict or they don't indict. In the rare instances, the United States Code, for example, provides for special grand juries investigating organized crime to issue reports. No other reports are authorized by grand juries or prosecutors under the United States Code, nor should they be.

There are circumstances, and Judge Walsh has alluded to this, when someone is innocent and the evidence clearly indicates that they were wrong, that they should not have been investigated, where a report I think serves a useful purpose in terms of clearing their name. But where there have been charges brought and some people are charged and some people aren't, I think the committee ought to consider the propriety of those kinds of reports, or decide that a report should only go to the court for review by appropriate oversight committees so that they can be comfortable with the job that was done by an independent counsel.

Finally, let me just, so I don't take up too much more time. I think that over the last 30 years, we have changed what crime is in this country. Congress has enacted a series of statutes which have really broadened the investigative power of the Department of Justice, the FBI and other agencies. That has been part of this process in which the independent counsel statute has flourished.

I think it is incumbent upon you as you review this to take into account, in whether or not you want to change the statute, to understand how easy it is to investigate people now under Federal law. Federal law, in many instances, is so broad and so vague, regrettably, that it is easy to begin an investigation of someone and to charge them.

It was said earlier that if a prosecutor focuses on someone long enough, they are going to find something, and they can. Technical violations of the law now, which used to be civil and administrative matters, are now crimes. An unfortunate development in American jurisprudence, because crimes ought to be bright line things. They shouldn't be accidental violations of criminal laws. Regrettably, that's where we are.

As far as fees are concerned, I have come to the conclusion that these cases are so unusual in the way they are generated. As you know, sometimes they come from oversight hearings. There's a lot of publicity. People may be traduced and besmirched during those hearings publicly, even though that's not the intention of the committees and its members. The lawyers are hired. Independent counsels are appointed, and large sums of money are spent by mere witnesses, people who are not even subjects, but mere witnesses.

I really favor compensating people in the full panoply of status. I don't believe that if someone is a target or a subject that that alone should constitute whether or not they get compensated under this statute. If you are going to have this statute and you are going to allow the kind of investigations that occur under it, which are very broad and which in my opinion would not be occurring under ordinary standards of criminal investigation, then I believe you must expand the kinds and numbers of people who are compensated for their attorneys' fees. It is only fair, since there are extraordinary circumstances.

I'll be happy to answer questions about that later, but I think I've said enough, Mr. Chairman. Thank you very much.

[The prepared statement of Mr. diGenova follows:]

PREPARED STATEMENT OF JOSEPH E. DIGENOVA, FORMER INDEPENDENT COUNSEL, AND PARTNER, DIGENOVA & TOENSING

Mr. Chairman, I appreciate this opportunity to respond to the Subcommittee's request for testimony. My formal testimony consists of a copy of a recent op-ed piece I wrote for the *New York Times* on the general subject of the Independent Counsel statute. Also available to the Subcommittee are my formal report, issued last year, and a transcript of my press conference held upon the release of that report. After a brief summary of my views on this subject, I, of course, will be delighted to respond to any question.

THE NEW YORK TIMES **OP-ED** TUESDAY, DECEMBER

Investigated to Death

By Joseph E. diGenova

WASHINGTON

As an independent counsel, I have just wrapped up a three-year inquiry into the State Department's search of Bill Clinton's passport file when he was a Presidential candidate. The investigation found no criminality, just political stupidity, in the Bush Administration. It also found that there should have been no special counsel appointed.

Far too many special counsels have been appointed since 1978 when the Ethics in Government Act established them in the wake of Watergate. At present, four are looking into allegations of wrongdoing in the Clinton Administration and a fifth is still probing Ronald Reagan's Department of Housing and Urban Development.

> Too many special counsels weaken the Presidency.

The power to investigate and prosecute is the power to destroy. When directed against an official by an independent counsel, who functions outside the standard constraints of executive branch accountability, such power is frightening.

An independent counsel statute is necessary for the rare occasions when constitutionality is threatened by the acts of a President or his close advisers or when conflict of interest in the Justice Department is clear. The Iran-contra affair and Watergate justified special counsel. But determining whether Housing Secretary Henry Cisneros did not tell an F.B.I. background reviewer the total amount of money he gave his former mistress does not.

The law should be amended to make appointments of special prosecutors less common. The types of investigations should be sharply limited. And the grounds for undertaking them should be tightly restricted.

Under the law, anyone can go to the Attorney General and accuse a high-level Administration official of committing a crime. The law says that if the allegation is "specific" and the alleger "credible," the Attorney General must conduct a preliminary inquiry that involves only voluntary interviews of witnesses. If the Attorney General determines, according to the law, that "further investigation is warranted," the appointment of an independent counsel must be sought. This is almost inevitable, given the limitations of the process. But if one is not appointed, career lawyers in the Justice Department can look into the matter.

In addition to the Cisneros inquiry, special prosecutors are looking into Whitewater, Commerce Secretary Ron Brown's financial dealings and former Agriculture Secretary Mike Espy's links to an Arkansas poultry processor. Since 1978 and before Mr. Clinton took office, 14 independent counsels had been appointed to investigate accusations involving Republican administrations.

I am a lifelong Republican. But my concern is not partisan. It's for the institution of the Presidency and the well-being of people who find themselves under the klieg lights. Mr. Clinton and the Presidency have been injured, and not just politically. When the public is told again and again that the Justice Department cannot be trusted to investigate a matter, the executive branch is hurt.

And what about the emotional and financial cost to people caught up in the maelstrom? At great expense lawyers must be hired, even by the most insignificant witnesses. The dire consequences of merely misspeaking, which could result in a false-statement charge, are high, given the prosecutor's vast powers. Careers are held captive, families are torn apart and the mental and physical health of those under investigation are put under strain. It is not unusual for people involved to lose their jobs, just when they need money to cover legal expenses.

If, under an amended statute, an Attorney General acted unwisely or unfairly and failed to seek the appointment of an independent counsel in appropriate circumstances, Congress and the press would surely raise the issue of accountability.

Democrats who stoutly defended the statute when Republicans held the White House now bemoan its application. The Republicans who criticized it then now defend its use. But the issues are too serious to be left to petty political maneuvering. Now that there has been bipartisan suffering, the President, members of Congress from both parties and the bar should face up to the problem.

Joseph E. diGenova, who practices criminal law, was a United States Attorney from 1983 to 1988.

Mr. MCCOLLUM. Thank you very much, Mr. diGenova. I want to roll over the D every time. I've got to get it right. I will continue to work at it.

Judge Walsh, I want to ask you a couple of questions about, first of all about the fee question. We have had both Mr. diGenova—I know what I'm doing, and I'm not doing it right—and Mr. Olson, talk about fees. Do you think that we should provide a broader latitude for those who are subject to either—not only to indictment but to inquiry to get fees than currently the law provides?

Judge WALSH. Yes. I think I do. I have thought about that a lot. One of the—there are two types of situations that arise, as I've looked at the fee applications. Recently the Congress has required that I look at them too. The career officer, whether he's in the State Department, the CIA or wherever, should certainly have his legal fees covered if he's not indicted. Now even if he is indicted, take a person like Clair George, who in courageous service for the CIA was tried twice because the first jury couldn't agree. I think something ought to be done about that.

It seemed to me there are two things that could be done. One is to permit the gift of legal services without getting in conflict with an ethics problem, whether it's from the President down to a career service officer in any of the departments. The idea that we have to have someone collecting a legal fee fund seems very unfortunate to me. I think that one of the reasons that I understand that legal fees are so high in the case of some public officers is that the lawyers feel that if they cut their fees, that is a gift to a public officer and their firm has business in the Government, and it may be misconstrued.

I think Congress might clarify that. In the Poindexter case, for example, where Admiral Poindexter had already retired, Fulbright and Jaworski charged no fee. They did hours and hours of work as a public service, which I thought was remarkable. Believe me, a prosecutor would much rather deal with a well represented opponent or subject than to deal with someone who has to skimp on his legal fees.

Mr. MCCOLLUM. Judge Mikva, what do you think about the legal fees?

Judge MIKVA. First of all, require people who go into public life, either try to carry these out of their own pocket, which they can't, or set up legal defense funds. This is abominable. I don't have to tell Members of Congress that one of the disadvantages of public life is the limit on the amount of money that you earn. There is no way that a public person can pay these fees. If they are convicted and go to jail, I suppose you can say well, they shouldn't be compensated. But in every other instance, if somebody is obligated to hire an attorney to defend themselves or their reputation, it is because of their public work. They ought to be compensated. I think that that ought to be one of the easiest things to explain as to why we're doing it.

Mr. MCCOLLUM. Judge Walsh, both you and Mr. diGenova have said that the independent counsel in the situation where you are dealing with a case that involves origins preceding the public office holder taking office shouldn't be involved in it. If the purpose, and that's a question, maybe that isn't the purpose, but if as I interpret

it the primary purpose of independent counsel law is to build public trust, why does the date or period of time when the crime occurred make any difference?

In other words, if the public would have confidence in a Department of Justice investigation of a serious crime committed just days before an official took office, why would it not have confidence in a Department of Justice investigation of crimes committed a few days after you took office?

Judge WALSH. I think that's a very sound question, and logically, it's very hard to distinguish the cases. I mean if there's a conflict of interest, take an Attorney General now who is sitting next to the Secretary of the Treasury in Cabinet meetings, and there's a question raised as to misconduct in the Treasury Department. That obviously, if it happens while the Attorney General is indeed the lawyer for the Secretary, that puts the Attorney General in a much more difficult position than if it was something that happened when the Attorney General wasn't responsible for the legal analysis of a department. So I think we can distinguish it that way.

But I take it on a broader basis. Assuming that logically it's very difficult to make the distinction, as a matter of public policy and a matter of deciding how many millions of dollars is going to be spent in dealing with a conflict problem, I think the public has a lower interest in what happened before a person took his oath of office than it has in something that someone has done in office while the Attorney General is sitting at his elbow and supposedly available for legal advice to him.

Mr. MCCOLLUM. Judge Mikva and Mr. Olson, I'd like for you to comment on this. Then I am going to go to Mr. Schumer. But do you have a feeling about whether or not we should be restricting the activity of an independent counsel law to the time after somebody has taken public office actions that occurred then or not?

Judge MIKVA. If this is intended to apply in unique, special circumstances, then it seems to me there's all the reason in the world to limit it to the conduct of public officials while they were in Federal office. To go back to when the statute of limitations allows you to, it doesn't make sense.

I guess the best example for me is Mr. Hubbell. Now what Mr. Hubbell did is reprehensible to anybody who is a lawyer certainly, and to everybody else too. But a lawyer thinks that that's a terrible thing that he did to convert a client's funds. In every other instance, that kind of matter would have been handled as a disciplinary matter by the local bar association and the local disciplinary authorities, or at most, if it was elevated enough to be criminal conduct at all, it would have been handled by a local prosecution.

To turn that into a Federal prosecution and by the special counsel, is way beyond what the idea of the special counsel——

Mr. MCCOLLUM. Let me ask you this though, and I don't want to belabor my time here. But in that particular case, you are arguing the issue of whether it should even be a Federal case or not, which I can understand. The other question though is if it is going to be one and you've got a high ranking official, in his case somebody very closely associated with the Department of Justice, even though the conduct may have occurred prior to his assuming office, if it is raised during the time he is in office, don't you have a prob-

lem with credibility of the Justice Department overseeing the investigation? That seems to me to be illustrative, even though maybe in the particular case it would have been preferable not to have a Federal case at all.

Judge MIKVA. I don't think so, because as you recall, Judge Starr discovered the evidence that Mr. Hubbell was involved in these inappropriate billings. At that point, Judge Starr was free to do one of two things if the statute would have encouraged him to do that. One, either refer that matter to the Department of Justice if it should be a Federal prosecution at all, and I have every reason to think that at that point that the Justice officials would have done the right thing. Or turn it over to the local officials in Arkansas and have them prosecute it if it's to be prosecuted.

Mr. MCCOLLUM. Mr. Olson, do you want to comment on it?

Mr. OLSON. I think there are two things. One is that an independent counsel will want to do that. I oppose the whole statute, and so therefore——

Mr. MCCOLLUM. I understand that.

Mr. OLSON. I am in favor of everything that restricts it. But from a philosophical standpoint, an independent counsel will want to have the power to use leverage over people who are associates of the person that he's investigating, and therefore will want to prosecute any evidence of crime that they find that will then give them the power to cause that witness to be a witness or source of information against the target of the information.

One other point is that I read the legislative history of this statute, and the framers of the statute and the discussions that occurred in Congress when it was framed included an expression of concern about law violations that occurred in the running for office in a Presidential campaign. That's why campaign officials are included as covered persons in the statute. So from a philosophical standpoint, those transgressions would have occurred prior to someone taking office, but they may have had to do with the individual coming into office. From a philosophical standpoint, would fall into the same justification for the statute itself.

Mr. MCCOLLUM. That's logical. Mr. diGenova, do you want to say anything about that?

Mr. DIGENOVA. I just want to say that I think it's important to understand that just because an independent counsel is not going to investigate and theoretically prosecute something, doesn't mean that it isn't going to be investigated and prosecuted. It simply means it's going to be done by somebody else.

The question of Webster Hubbell is a unique one, since he was a senior Justice Department official. As you know, in the past when senior Justice Department officials, when we had the question of the Tax Division, and a special counsel was appointed by the President to investigate the Tax Division, that was all handled outside the Justice Department without an independent counsel statute. There were prosecutions, both of the Treasury Department officials and people in the Justice Department.

That is a similar case, but it was done without an independent counsel statute. Remember, you can still have special counsels. Mr. Fisk was a special counsel when the statute had lapsed. I have con-

fidence in that process, where the Attorney General has the regulatory authority to appoint special counsels.

But I think this long-gone conduct that occurs in a State before someone becomes a Federal official, and I would except as Ted has said stuff that happens during a campaign leading up to office, because you could draft a statute to cover that very very easily. I think when you start reaching back to conduct before you came into office, you then run the risk of creating a situation where you have conduct which does not relate to the kinds of things that we were originally concerned about, which was the corruption of the constitutional process of Government when we enacted this statute.

Mr. MCCOLLUM. Well, I understand that. My time has really expired. It is a little inconsistent, because I think you did say Whitewater was one of the three that you would list as one that was appropriate for the independent counsel. Yet most of the origins of that preceded the President taking office. Of course the savings and loan issue maybe didn't.

Judge WALSH. Mr. Chairman, could I add one——

Mr. MCCOLLUM. First, I think Mr. diGenova wants to make——

Mr. DIGENOVA. The only thing I was going to say is there you have allegations, however distant, about the President of the United States himself and people very close to him involved in the campaign. Remember, there's also campaign activity involved in this as well.

So I mean—and I really don't want to talk too much about Whitewater. We have an ongoing investigation there. There are people's reputations at stake. Whitewater is a different kettle of fish. We can all argue about whether reaching back.

Mr. MCCOLLUM. I want to give Mr. Schumer time. Judge Walsh, can you refrain and let me ask some questions? All right, go ahead.

Judge WALSH. I was just going to say, it's not a question—the question is the degree of insulation of the Attorney General. An independent counsel has a double insulation, not only the Attorney General has an outside counsel do the job, but he or she doesn't even appoint the outside independent counsel.

Now I don't think you need to take that extreme measure for every technical conflict of interest that might arise or logical conflict of interest. It seems to me that when Jack Keeney has a chance to testify here, that he may be able to explain better than I can the ways of insulating this question within the Department without establishing a whole new law office and all of the expense that goes with it. There are other ways of limiting it to a career level and doing other matters which takes the Attorney General out of the line of command and yet doesn't create a whole new office. You still have the files of the Department of Justice to use, the library of the Department of Justice, and all of those things that go with it. Excuse me for intruding on your time, sir.

Mr. MCCOLLUM. I think—I haven't yielded to him. Mr. Schumer has asked that I not turn to him right now before we go take a vote. We are going to have to do that. He'd like to get his time. I will yield to him liberally the 10 minutes that I took. Then I'm going to try to restrict everybody to the 5 minute rule.

Thank you very much, Mr. Walsh. We'll be in recess until after this vote.

[Recess.]

Mr. MCCOLLUM. We're going to reconvene the subcommittee hearing. Mr. Schumer is not yet back. He should be going next, but because we're going to have a 10-minute vote shortly, I'm going to recognize the gentleman from North Carolina for 5 minutes, let him ask his questions. When Mr. Schumer comes back, he'll have whatever time he needs.

Mr. Coble.

Mr. COBLE. Mr. Chairman, I thank you.

Mr. diGenova, you said you were 51 years young. Sir, that may not be young, but I can assure you it ain't old. Good to have you all with us.

Mr. Chairman, I want to just make a comment or two and maybe put a question. I want to revert to what Mr. Dickey said at the outset about the enormous costs that have been expended in this independent counsel exercise. He alluded to the Whitewater hearings.

Whitewater hearings have pretty clearly revealed that many who were involved in that exercise are either unwilling and/or incapable of telling the truth. But I don't know that we need formal hearings, nor an independent counsel to illustrate that conclusion. I don't mean this to sound as partisan as it's going to, but credibility appears to be an ingredient that is sorely missing with many in the present administration.

But meanwhile, the meter continues to run and costs continue to mount. When is enough enough? When do we turn the spigot off?

Judge Walsh, much has been said about your hearings. I am sure, sir, that your exceptional intellect surpasses my average intellect. At least I hope mine is at least average.

Judge WALSH. Don't jump to that conclusion.

Mr. COBLE. I would say that very confidently. But, Judge, given my propensity for frugality, I am confident that I could have conducted the hearings you did, probably came up with the same findings, with a whole lot less cost. I just am uneasy about the costs that continue to be born out, and the taxpayer foots the bill.

There seems to be, Mr. Chairman, a consistent thread that is readily visible in the Federal bureaucracy. That thread is the impersonal, reckless, imprudent manner in which Federal spending occurs. Oh, Federal money comes from the trees. It falls down from the trees. We pick it up and readily spend it. Many folks believe that. That is how many folks respond to Federal money.

Federal money, my friends, comes from the pockets of taxpayers. Now who regards these moneys so impersonally? Who are these bureaucrats? Federal judges are these bureaucrats, Members of Congress are these bureaucrats, independent counsels are these bureaucrats. The thousands and thousands of Federal bureaucrats are these bureaucrats.

What is getting me to my final point, Mr. Chairman, is simply what the gentleman from Arkansas, Mr. Dickey said. It appears to me that there must be some sort of accountability. Bring the independent counsel within the budgetary/appropriations process. At least that way, I am confident that you would see the meter not running eternally. I am confident you would see the costs reduced.

I have never been an independent counsel. I am just thinking aloud now, Mr. Chairman. But if I were going to have to fly here,

there and yonder, I would fly coach. I would perhaps order a medium priced dinner rather than the top of the line. If I wanted a drink, I'd probably go to the bar to get it, rather than have it ordered up to my room. These are little things I am giving as an example, and not necessarily pointing the finger at anybody. But the fact that there is no accountability, no requirement for accountability bothers me. I think that's why these costs on the blue sheet before us, Mr. Chairman, is so out of line.

Now my 5 minutes have almost gone. If anybody on the panel wants to refute what I have said, fire away. If not, I'll yield back my time.

Mr. Chairman, I'll yield back my time.

Mr. MCCOLLUM. Very well. At this point, I'll recognize Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman. First, I want to thank the panel for their thoughtful testimony and make two points before getting into the matter I wish to explore.

First, I would like to compliment both Mr. Hyde and Mr. Dickey, neither of whom are here, because their position has stayed consistent on independent counsel. We see a change in the parties. Whichever party is in power doesn't want much of an independent counsel role. Whichever party is out, wants a stronger independent counsel role. I don't think that's fair. Henry and Mr. Dickey have stayed consistent. They had the same view when there was a Bush administration as now there's a Clinton.

The second thing I'd say is I think we're fairly close to consensus, if you listen to the panelists here, comments on both sides of the aisle in terms of certain of these changes. I'm hopeful we can get some done while keeping the counsel law.

My concern of course is the concern I mentioned earlier. Obviously I do not want you to comment on Ken Starr's specific situation that just came out in an article today, but I am very concerned about the general conflict of interest. Here we are at what should be the apotheosis of no conflicts of interest. We have arranged to appoint independent counsels for the very purpose of having no conflicts of interest, and yet, because if they maintain outside practice in one way or another, they may well run into them according to this magazine article. Ken Starr clearly has in a—to me, a not trivial way at all. We'll see if the facts are right.

So Judge Mikva mentioned in his testimony that he thought when you are independent counsel, you should not do anything else. I'd like to know the judgments of Mr. Olson, Judge Walsh, and Mr. diGenova on that issue first. Do you agree that when you are independent counsel, you should not be part-time in law practice, be part of a law firm or whatever else?

Mr. OLSON. I do agree. As I stated in my testimony, in addition to the reasons that you articulate with respect to potential conflicts of interest or perceived conflicts of interest, because the responsibility is so great, and because the pressure and damage to people who are being investigated or who are dragged into the investigative process is so great, we owe to those people a full-time investigation.

Mr. SCHUMER. In terms of speed.

Mr. OLSON. Yes, and the country. Now we have the spectacle of some of the leading officials in our Government, including the

President of the United States being subjected to a criminal investigation. I believe even if it wasn't people at quite that level, that the Nation deserves an investigation that moves as rapidly as possible.

Now I'm sure that under some circumstances, an independent counsel might say well, it won't require my full time. But I still think that we have to make a choice in those cases. I think it should be a job that someone undertakes fully.

Even though it might be difficult to get young people to come into the office, I think that ought to apply to the subordinates in the office too.

Mr. SCHUMER. You do.

Mr. OLSON. I don't see why people from the Justice Department can't be delegated, if they are going to be supervised by someone who is a full-time independent counsel. So I think all of the problems can be solved if we do it that way.

Mr. SCHUMER. Judge Walsh.

Judge WALSH. I did work full-time. It took me about 3 months to clean up one matter that nobody else could—I turned over everything else to others. There was one matter that I had to finish. But except for that, I worked full time.

But there is a problem. The statute, as I remember it, makes the independent counsel a per diem employee and limits the number of days he can work. So——

Mr. SCHUMER. You'd have to change that.

Judge WALSH. The old idea was that it was just a lawyer taking on a new client, a new case. That he wasn't supposed to leave his firm. He should just take on this new matter.

Mr. SCHUMER. But assuming we eliminated those provisions.

Judge WALSH. But something has to be done about that.

The second thing, I'm a little worried about an absolute requirement. There were periods where the intensity was very heavy and there just was no question you were there 12 to 14 hours a day. There were other periods where it slacked off, an investigation that ran as long as mine toward the end where you are writing your report and things like that, there may be some place where you'd want to have some flexibility that may be with the consent of the appointing court, something like that.

Except for that, I really think it should be full—if it's not a full-time job, there shouldn't have been an independent counsel appointed in the first place.

Mr. SCHUMER. Good point.

Judge WALSH. He's been appointed for something that's too small.

Mr. SCHUMER. That's well put. Well put, Judge Walsh, in my judgment anyway.

Mr. diGenova, I'm catching McCollumitis. I'm having trouble pronouncing your name.

Mr. DIGENOVA. Mr. Schumer, I think it ought to be a full-time job. I don't think there is any problem with that. I do think there is a compensation problem, and it needs to be dealt with if you are going to get the kind of people you want to take on, because remember, our view is, I think it's a general consensus, that these ought to be limited to the types of circumstances in which they are

going to be used in the future, not the way they have been used in the last 20 years.

So if that is the case, then presumably it is something of some moment. You are going to want a person of some stature, and presumably, you ought to pay him more than $45 an hour.

Mr. SCHUMER. In the kind of case we're looking at now with the investigation of the President and the First Lady, you would all agree that that would be the type of case where it clearly should be a full-time job. Is that correct?

Mr. DIGENOVA. I don't think there's any question about that for me.

Mr. SCHUMER. Let the record show, all four in the panel agreed with that.

Let me ask you the second question related to that. According to this article, Mr. Starr appointed his own ethics counsel to judge on the conflict of interest issue. Let me start with you, Judge Mikva, because you didn't get to answer. Do you think that is a good idea or should there be some independent counsel, whether within the Justice Department under say Mr. Keeney's jurisdiction or elsewhere to deal with conflicts of interest, if they are going to continue to exist. That is, if we don't make it full time.

Judge MIKVA. I feel so strongly that the statute ought to be changed to make it full-time, that I guess I'm sort of like Ted Olson, it's hard to contemplate that you can prove it any other way.

But again, if there is going to be the ongoing part-time notion that you can handle it by being special counsel one day and a private partner the other day, then it seems to me that we ought to at least make the judgments should be made by the Office of Government Ethics generally or some outside source.

I am reminded, Congressman Schumer, that when I came to Congress in those bad old days, you could practice law and still be a Member of Congress as far as the ethics people were concerned. I tried it for 3 months. There's no way you can avoid the conflicts that forced Congress ultimately to decide you either be a Congressman or a practicing lawyer. You can't do both at the same time. I think the same thing is true of the special counsel.

Mr. SCHUMER. There is no question. I mean even now, I am one who believes that this is a case that's—the case that Starr is looking into, is an appropriate one for an independent counsel, and I'd want to see him get to the bottom of whatever is there, if anything. But already his fairness has been jaundiced by listing a couple of clients who are—one is some conservative foundation, one is I think some Republican office holder or something like that. It leads inevitably to conflict, especially in an important case like this. I'll speak for myself in not commenting on the facts in the article.

Judge Starr showed bad judgment, in my judgment, continuing with all these other clients while this existed. His predecessor, Robert Fisk, was criticized for having conflicts of interest, and he had given up his practice to do this.

Did you want to say something, Mr. Olson?

Mr. OLSON. I was going to answer your question about the ethics.

Mr. SCHUMER. Please.

Mr. OLSON. I do have to say, because I'm very close personally to Ken Starr, that I have enormous respect for his integrity. I know

of very few people who have more of a conscientious regard for things like that.

Mr. SCHUMER. Everybody says that, by the way, that I have talked with.

Mr. OLSON. With respect to getting ethics advice, I think—I don't want to second-guess what he did or anything like that, but the Justice Department provides its services in various different ways to independent counsels. The Office of Legal Counsel is available to render legal opinions. The ethics offices in the Department of Justice could render that kind of service. It doesn't seem to me that there is any reason to go outside to hire someone special to do that.

Mr. SCHUMER. Let me ask a final question of any of the panelists. Does the law need to more fully articulate exactly which ethical standards apply? I'm not just referring to conflict of interest, but is this independent counsel, should his ethical standards be the same as a prosecutor? Does he sort of verge because of the way he was appointed into a more rarified atmosphere such as is a judge? Do any of you have any thoughts on that? Because I guess we're dealing in something of an undefined territory here. The law is still relatively new——

Mr. DIGENOVA. Mr. Schumer, I would think that the same standards that govern a U.S. attorney ought to govern an independent counsel. They are very good. They are very clear. They tell you what you can say to the press, what you can't say to the press. They tell you what your conflicts of interest are, how you reveal them to the Office of Government Ethics, how you go and get rulings about your investments and things like that. There is already a structure that exists. There are rules and regulations. I don't see why an independent counsel shouldn't be treated precisely like a U.S. attorney.

Mr. SCHUMER. Do the rest of the panel agree?

Judge MIKVA. I do. And I think that we got ourselves in some trouble with the notion that we would apply different measuring sticks for the conduct of the independent counsel and of the appointing panel different than would normally be applied to them in their normal capacity. I agree with Joe diGenova completely. That if you simply applied the standards of conduct that are expected of all U.S. attorneys and all other people in the Department of Justice, if you applied the standards that are applied of all Federal judges in every other circumstance, we would have avoided some of these unfortunate——

Mr. DIGENOVA. Remember the reason for that, and I apologize. I'm not——

Mr. SCHUMER. No, no, no. This is important.

Mr. DIGENOVA. The reason that was done originally was to exempt the independent counsel from all sorts of restrictions, because people were afraid that if anyone had any control over this person by way of limiting through some other judgment his or her activities, it might undercut the notion of independence. I think we have lived with this statute long enough to know that that is a dangerous precedent, to have that kind of unfettered power.

Mr. SCHUMER. I appreciate it. I think it's a good suggestion. I think whatever statute we come up with, my reaction would be we

ought to write in those standards. Write in the standards of the U.S. attorney, ethical standards the same.

Judge Walsh, I'll give you the last word.

Judge WALSH. One of the problems is when you come back into this after being out of Government for 20 years or so, there's no one there really to turn to because of the extreme requirement of independence surrounding us at the time. There is no administrative corps for your office to get guidance from. You go to the administrative office of the court, and they try to help.

There is also no one to explain the things that Joe diGenova just explained. That you are entitled to do this and do that.

Mr. DIGENOVA. It is very difficult for a person taking on one of these jobs, Mr. Schumer, because if you are the slightest bit conscientious, you are worried about getting started right away and doing your job. There is no place to do it. You are operating out of your office for a while. This is, by the way, not the fault of the Administrative Office of U.S. Courts. They do a fabulous job under extremely difficult circumstances.

As I said to Senator Levin's staff when I was first appointed, it took me 4 months to leave my own office and have all the other attorneys that I had hired in one location, because there wasn't any space available other than Xanadu, which I would not lease. I refused to lease a very expensive space. I ended up in basically a garage over on Vermont Avenue, but it took us 4 months. That wasn't the fault of anybody.

There ought to be permanent preliminary space available for every independent counsel somewhere in the Federal Government. There ought to be an office, that when the person is appointed, they go there right away, there's an office with some computers, maybe a secretary, and certainly a skiff. That is, a specialized room for classified information. Because it costs thousands and thousands of dollars to build one of these skiffs. If you are appointed and there's no place to go, you've got to build one. It's crazy. It's absolutely crazy.

Mr. SCHUMER. That's a very good point. I thank all of the witnesses for very thoughtful comments to my questions.

Mr. MCCOLLUM. These have been excellent responses and really very constructive in our efforts.

Mr. Conyers, I'm going to come to you next. Mr. Bryant, I'm doing that because I recognized Mr. Coble as the only member present. We didn't go normally in our order before. So we're going to take two from this side.

Mr. Conyers, you are recognized.

Mr. CONYERS. Thank you very much. I welcome all of the distinguished witnesses. Although I'm not sure why Mr. Olson had to be before this same panel. But nevertheless, this is an important, very important subject matter.

We have discussed about requiring a higher threshold. There seems to be some general agreement. We have talked about not investigating matters before a Federal official has taken his duties. There seems to be some general agreement. We have discussed the notion of having some fee payment operation so that Margaret Williams won't owe a quarter of a million dollars from having been called before an independent counsel. We have talked about limit-

ing the scope of the independent counsel's responsibilities in a very reasonable way. So what I am thinking about doing, members of this committee, is introducing a bill that accomplishes that purpose.

You know, the fact of the matter is that we have just thrown the baby out of the window here after we have had my distinguished chairman, whom I lavish great praise upon, Henry Hyde, and Mr. Dickey testify. They simply don't have this. You have very helpfully given us the guidance for a new piece of legislation, a new proposal that will speak with more clarity and understanding to these matters than any that have gone before.

Would you agree that my consensus that I think we have arrived at, Judge Walsh, and the fact that a new measure ought to encompass these matters is a far preferable approach?

Judge WALSH. I think that you have summarized a very—made a very good summary of the consensus. I would have to leave to the committee as to how best to handle this legislatively and how best to use the legislative process to adapt the ideas that Congressman Conyers has put together and those that Congressman Dickey, who working from his concern for expense also was approaching. How they should be bridged, I would have to leave——

Mr. CONYERS. Well, you are a gentleman and a scholar, in and out of your independent counsel role. The fact of the matter is, if we get a bill that we have to go back into on all of these matters, heaven help what you'll see as a final product as it goes through the stages.

Mr. diGenova, clear that smile from your countenance. Give me some instruction too, if you would, my friend.

Mr. DIGENOVA. Mr. Conyers, I concur with Judge Walsh. I think that the outline of the bill you have just given is a good fix for real problems. In other words, I don't think there is any question among this panel, I think Ted feels very strongly for I think legitimate reasons that there ought not to be an independent counsel statute.

Mr. CONYERS. That's why I'm not going to ask him any questions too.

Mr. DIGENOVA. That's OK. He's a good friend and he's one of the greatest intellects——

Mr. CONYERS. He's a nice guy.

Mr. DIGENOVA [continuing]. I have ever had the opportunity to work with on legal issues.

I think that we can have a statute, but we can appropriately limit it in some of the—certainly those areas you have outlined are important, because we do need a statute. There is no question about it. But we need it for rare occasions, not for the plethora of times it's been used over the last 20 years.

Let me just—I want to echo what Judge Walsh said about some of the other people who have been ensnared in these investigations. We all have a chance to step back when things are over. We become a little more human. We get a chance to look at the damage that has been done to people.

When you have a subordinate who has acted under orders like a Clair George, who has given his life to his country. I know people may differ about this. Those people should be taken care of. Their

massive attorneys' fees should be. Maggie Williams. All of these people who suffer now because they got caught in this maelstrom called Washington, DC, and they are being scrutinized under a microscope. We have got to find a way to help these people.

Mr. CONYERS. I agree with you. You know, your benevolent attitude is very striking as compared with your prosecutorial attitude that I remember going back into the 1970's, sir. What kind of conversion has occurred in the course of your career is exciting and interesting, not the subject of this hearing of course. But it is very striking.

Now how you become a defense lawyer and then become a prosecutor is a feat I would like to see happen. The process is usually you come out of law school and you're lucky to get a job at the lowest rung as a prosecutor. Then you get all that experience. After you have talked tough for 20 years, then you become a defense counsel, and all of a sudden you understand the travail that you have put hundreds of people through in the course of your 30 year legal career.

Mr. DIGENOVA. Mr. Conyers, you know the cases we dismiss when we're prosecutors you never hear about.

Mr. CONYERS. Yes. But the few, the small number you never hear about is one of the reasons you don't hear about them, sir.

Thank you, Mr. Chairman.

Mr. MCCOLLUM. Thank you, Mr. Conyers.

Mr. Bryant. You are recognized for 5 minutes.

Mr. BRYANT OF TENNESSEE. Thank you, Mr. Chairman. I too want to thank the entire panel. It's such a distinguished panel that we've got before us. I appreciate all of you coming.

Mr. diGenova, you've mentioned Jack Keeney before, and several of you have mentioned him in your testimony. I know he's on the next panel. I just want to add my feelings also and concur with your opinion of him. If everyone were like him, we wouldn't need this type of special prosecutor or have to worry about these kinds of things.

I'd like to ask just a couple, really three, questions. Maybe I can ask them at one time, if you can remember them. Mr. diGenova, you have already, I think, responded to these. You might want to add something to them.

I am concerned about any law that—you mentioned the standard of appointment, that maybe it's too low. I am wondering if the other three of you, and I'd start with Mr. Olson, on the standard that the Attorney General uses, should it be higher, and what should that standard be, probable cause or whatever?

Second, how can we rein in the spending? Is there any way that we can limit spending, hold that person accountable?

Third, limits. We've been under a lot of pressure for term limits for Congress. But is there a way we could set a time to renew that appointment or is there anything practical that we can do rather than just have it never ending? I realize we're working within the context of a prosecutor and an investigator trying to get to the facts, and sometimes that takes a while and it's expensive. But I'm just looking for—you folks are experts—your suggestions to us. If you could answer those three questions as quickly as you can so that we can give the others time.

Mr. OLSON. Thank you, Mr. Bryant. I'll be very brief. I do believe the standard for which an appointment is made should be changed. It should be higher. I believe that there should be something along the lines of substantial evidence that a crime has been committed. It ought to be a narrow list of crimes, not the entire Federal code.

Point number two with respect to the spending, I don't see why we couldn't establish a budget in the process. There have been suggestions made along those lines. Every other aspect of Government has a budget before it starts. Now sometimes, you might have to go back and change the budget, but you can start with the budget. Judge Mikva has suggested some time limits. They may be a little bit short, but that's a very good idea, and I would agree with that.

Mr. BRYANT of Tennessee. Thank you.

Judge Mikva.

Judge MIKVA. First of all, in addition to the other standards about substantial evidence and so on, I like the idea that either Mr. Olson or Mr. diGenova suggested, maybe it was Judge Walsh, that the Attorney General have to find that there is some important public reason why the special counsel is needed. It shouldn't be just every run of the mill case, because again, that's the best way of limiting the money spent, is limiting the number of special counsels.

Second, I see no reason why—the Administrative Office won't like me for saying this, but I see no reason why the Administrative Office shouldn't come up with a budget for each special counsel, and that the special counsel ought to live within that budget. They do budgets all the time over at the Administrative Office. They won't like doing it here, but I don't think that would in any way impinge the independence of the special counsel, that he or she has to respond to the Administrative Offices conducting their fiscal responsibility.

As far as term limits, I suggested 3 months as the initial period of appointment. If that's too short, make it longer. But there really ought to be a short finite period in which the special counsel says yes, we need to go ahead or no, it should be dismissed or the regular channels of the Department of Justice can handle it. It is only in that rare circumstance where they need a special counsel prosecution that there should be anything beyond 3 or 6 months.

Mr. BRYANT of Tennessee. Thank you. Mr. Walsh.

Judge WALSH. I think there should be a factor of public interest in the appointment. How to spell that out more specifically, I haven't thought out. But it could be done. These appointments are too expensive and really too cumbersome in a way, to use them on every possible violation.

On budget, I have difficulty. These are not—excuse me. These are not standardized products, in any sense of the word. It depends so much on the scope of the investigation as it unfolds. Realize that the independent counsel does not have the advantage of an ongoing agency where he has his budget experts there and his own internal controls all in place. He comes in from the outside, and he has to find his way through it. When he starts, he doesn't have a much better idea than anybody else where his investigation is going to lead.

Indeed, I had an idea I would be through in two years if you had asked. I hadn't counted on congressional immunity being given to North and Poindexter. I thought North and Poindexter were as far as I had to go. All those things turned out to be wrong.

I would welcome budgetary assistance from the Administrative Office. When I got there, I didn't know enough to make full use of that. Also, from GAO. I didn't know that I could turn to them for advice.

I think some kind of a requirement that he work out a budget with them, subject to change, would be good. But it shouldn't be hemmed in by a lot of rigidity, when he doesn't know where he's going when he starts.

Coming back to time limits, I'm sure an independent counsel can survive that sort of problem of having to justify what he has done every 2 years. My own instinct was against it because it leads the public and leads others to expect something to happen before it may happen. That may be a minor objection, but I think with time limits, with him explaining to the appointing court why he has to go or even an interim report, I would have been glad to do that. I did file interim reports from time to time. If Congress wanted an interim report on what I was doing, why it was taking so long and costing so much, I would be willing to do that—would have been willing to do that.

Mr. BRYANT of Tennessee. Thank you. Do you have anything to add?

Mr. DIGENOVA. I think the standard, the threshold for invocation of the statute which Ted Olson has articulated, is certainly a good one. Adding the public interest factor as Judge Walsh was saying, and try to articulate that.

Cost and time limit. If you are going to ask someone to take on one of these jobs, you are going to ask them to do it correctly. I don't have any problem with the budget. I think we have all dealt with budgets. I was a U.S. attorney. I had a budget down there. I had to figure out how to function within it. So I don't have a problem with a budget per se.

Time limits are a dangerous thing. I'll tell you why. If somebody wants to delay your investigation through litigation and do other things and they can push that time limit, they can delay the production of documents. They can do tons of things. The time limit is a dangerous thing to put in place if you are really serious about having a real investigation. Remember what we're saying here. We're saying you are going to cut back the use of these and not have them be as frequent, and save them for those rare instances when there is the equivalent of a constitutional crisis. Do you really want to put a time limit on that?

Remember, there's a natural time limit. If someone goes on too long without producing a product or moving forward, Congress talks about it. The press writes about it. People get angry about it. There are pressures. Prosecutors, contrary to popular belief, are human. They do respond to those things. They may not change their decision, but it might change their time table. They might act with more dispatch.

I have a natural instinct against time limits, but I can understand them being put in if people want to do that. Certainly I don't

have any problem with saying every 2 years you have to justify your existence. My goodness, that would be an easy one to say I could support. But if you start putting in time frames within things within which certain investigative steps must be accomplished, I would be opposed to that entirely.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman.

Mr. MCCOLLUM. Thank you, Mr. Bryant.

Mr. Scott, you are recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. I wanted to follow up a little bit on some of the comments because I think the way the bill is written right now, it prohibits the Attorney General from exercising any discretion as to what is worth the effort and what isn't. In fact, they specifically prohibit the Attorney General from dismissing a case based on lack of criminal intent. They can know that there can't be a prosecution. It can be a technical violation. You end up with the 4 months getting an office together, just to come up with the same conclusion.

How would you respond to the question that if you give the Attorney General that kind of discretion to make the case or not make the case, that you have essentially undermined the value of the process?

Mr. DIGENOVA. Mr. Scott, let me address that question because I, in my article in the New York Times, I address this. If an Attorney General were to abuse that discretion, we're in the right room. It's called impeachment. It isn't used enough.

The Brits resign when they commit a faux pas. We don't have resignation in this country. We probably ought to have more of it, but we don't. If an Attorney General abuses that authority, I would believe that this committee would gather together faster than a flock of geese and start popping subpoenas up there and start asking questions, quite appropriately. I think the congressional oversight process in that case could be used very effectively.

The one thing I would not do, and the one thing that I regret has occurred in Congress in the last 10 years, and that is calling career prosecutors up from the Justice Department, line attorneys to testify before Congress, which I think is a very terrible mistake when Congress has started to do. That is why you have political appointees in the Justice Department. They should come up and explain why decisions were or were not made in cases. I don't believe line prosecutors should be testifying before Congress.

But you can control an Attorney General. Maybe not control, but hold accountable. If a bad decision is made, my goodness, there are many many political avenues available to Congress and others. Listen, FBI agents know how to talk to the press. If they think that something has been done that's improper, it won't take long for them to say something to their favorite reporter.

Judge WALSH. I don't see any reason why the Attorney General should not take into account criminal content.

Mr. DIGENOVA. Right.

Judge WALSH. It's a very illusive and difficult issue to deal with. My guess is that the Attorney General would be slow to fail to act on a finding of lack of criminal intent. But he or she should have that power.

Mr. SCOTT. In terms of appointing a special prosecutor, the U.S. attorneys are political appointees. The special prosecutors are judicial appointees. Should partisan affiliation be considered?

Judge WALSH. I don't think it should be an important factor. The person who is appointed independent counsel ideally should be someone who is beyond that kind of interest, partisan interest one way or the other. There may be some value to having a person—you could argue it either way, when it helps to have a person who is of the same party as the principal person under investigation and when not. But I really think that becomes a minor factor if you pick the right independent counsel.

Mr. SCOTT. The person should be above perceived to be above partisan politics.

Judge WALSH. Yes. I think it would be desirable that he not be immediately active as a partisan one way or the other.

Judge MIKVA. Let me say, Congressman Scott, I think it would be a mistake though to try to spell those out in the statute. They should be, but like most qualifications, when you put them in the statute they become much too rigid and they don't really accomplish the purpose.

I am much more concerned about the appearances of the appointment being such that that question doesn't come up. Indeed, when Judge McKinnon was the head of the panel, partly because of the methods he used in finding out the appropriate people to appoint as special counsel, the question never came up. Now Judge McKinnon himself was a very partisan Republican. He had been a Member of this Congress and elected from Minnesota as a Republican, was considered a very conservative jurist. But as far as when he headed up the special panel, the question just didn't arise.

Mr. SCOTT. And another quick question before my time runs out. I don't mean to cut you off. On the attorneys' fees, since you are setting up a special office, do you get a question of proportionality? A person has to—if you've just got a local prosecutor coming after you, it's one thing. If you have a new office set up for the specific purpose of coming after you, you have to hire additional firepower.

Would you agree to attorneys' fees, guilty or innocent?

Judge WALSH. Would I? Yes. I would. For Government officials. I think if a person is under investigation because of what he did in accordance with the direction of his superior or with the knowledge of his superior in his office and it's not a venal crime, then the Government should act as a private corporation would and protect its people.

To ask a career officer to stand the enormous expense that litigation now entails I think is unfair to him. I also again, repeat my earlier suggestion, that something ought, in the law or otherwise, ought to make it clear that it's not an illegal gift for a lawyer to do a job cheaper for a Government employee than he would for a corporate client.

Mr. SCOTT. Does anyone have any other comments on whether persons—I think we had the question of whether it's an innocent person, a person unindicted would get legal fees paid, but another person, a person who is guilty or guilty of a lesser charge would not have attorneys' fees paid.

Mr. OLSON. May I add one thing? The standard now in the statute or one of the standards in the statute is the court must, in order to reimburse fees, the court must find that the fees would not have been incurred but for the operation of the independent counsel law itself. That is not a bad idea, because normal people who are accused of a crime do not have their attorneys' fees reimbursed for them. We reimburse fees for people who are investigated under this statute when the normal process would not have caused them to be investigated.

I would phrase it slightly differently, and put the burden on someone opposing or the Government opposing the payment of fees so that the Government would have the responsibility of establishing that indeed there would have been a prosecution, because it is difficult for an individual to make an affirmative case that these fees would not have been incurred but for the independent counsel law. So the idea is a good one. But the burden should be shifted.

Mr. DIGENOVA. Yes. There needs to be a presumption that the fees will be paid, regardless of the outcome because of the unique use of the statute. It is very unfair to these people. Remember, they are in this predicament because they work for the Government or they worked for a President. They got caught up in a huge political controversy, which then turned into a criminal controversy between let's say for example, the two branches of Government.

Iran-Contra, the best example. Clair George spent his entire life sacrificing his safety, his family's safety for his country. Remember, he took the place of Mr. Welsh, who was murdered in Athens. Remember the CIA station chief who was murdered in Athens? It was Clair George who took his place in Athens. Clair George was acting under orders in Iran-Contra. He was protecting some of the most important information our country had. He knew about Aldridge Ames. He couldn't use that. He knew that there was a mole in the CIA, but he couldn't use that in his defense. He chose not to. He could have stopped his prosecution had he chosen to use the fact that he knew that he was investigating a mole inside the CIA. He could have stopped the prosecution or he could have thrown such a wrench into his prosecution that it never would have gone forward.

People like Clair George, even now, deserve to have their attorneys' fees paid. Maggie Williams, all of these people. They deserve to have their attorneys' fees paid. This is a very, very serious thing. People's lives and financial futures are being ruined. This is not a partisan issue. That to me is irrelevant with the question of attorneys' fees. Guilt or innocence is irrelevant.

Judge WALSH. I would like to say that I accept Ted Olson's suggestion of the standard for selecting those to be paid and not. It should be related to the intensity. An independent counsel's investigation tends to me more intense than an ordinary prosecution, even though he tries to be fair. The fact is, as Ted said, you start off by the court telling you who to investigate. You don't make that decision. So then you have a public responsibility, you want to do it right. There's a tendency to greater intensity. I think that makes a proper standard for perhaps treating a target of an independent counsel's investigation differently from an ordinary investigation.

But I am also concerned generally with leaving a Government employee out to pay the high legal costs of today just for doing what he thought was his job, and if someone says afterward you shouldn't have done this for this and this reason.

Mr. SCOTT. Mr. Chairman, and further I think without asking another question, I think the fact that you are dealing with a special prosecutor rather than a normal Government's attorney for whatever crime you did commit, the legal fees involved in getting through that process would be much less than getting through the process with a special prosecutor.

Mr. DIGENOVA. Absolutely. You know, there's an old joke about a lawyer with one case. It's true. You have to be careful about it.

Judge MIKVA. It's also true of a prosecutor with one case, which is one of the problems with the special counsel.

Mr. DIGENOVA. That is exactly right. Judge Mikva has again ruled correctly.

Mr. MCCOLLUM. I think we have a resolution of opinion on this, concurrence of opinion on this.

Mr. Barr, you are recognized for 5 minutes.

Mr. BARR. Thank you, Mr. Chairman. I appreciate some of your last remarks, Mr. diGenova. I knew when I worked at the agency, I knew Mr. Walsh personally. It really was tragic in December 1975 when he was murdered, because of Mr. Philip Agee and a number of other individuals that still to this day have escaped prosecution for the murder. I think that the fact that many men and women in our Government do put their lives on the line and then because of policy decisions or shifting policy decisions or policy perspectives changing over the years, all of a sudden they find themselves on the other side of these situations. So I appreciate your bringing that very important element into all this.

I read your article, which as with all of the documents and opinions and legal work that I have read of yours over the years, of course is very eloquent and very much on point, short as it is, it does make some very good points. One word in your article that I find in the second to the last paragraph is your use of the term accountability, a word that for far too long I think has been absent from the vocabulary of when we look at what Government is doing. We look at little bits and pieces without thinking about accountability.

We had another former colleague of yours and mine up here a couple of months ago, Judge Bell. We were looking at a somewhat different matter, but Judge Bell and his wonderful ability to really just cut through a lot of the rhetoric and get to the point. We were looking at how big is the Federal law enforcement effort is, how many people do we have out there purporting to enforce Federal laws and take action against our citizens?

He looked at a study that had been done, and of course based on his vast experience in the Federal legal system, basically said we just have too darn many people trying to do too many things. We don't even know what they are doing. We've got to reign a lot of this in.

I think sort of that same thing applies here. We just have too many people out there, as the diagram on your article indicates really, with the dogs tripping each other, it's the same in human

terms. We just have far too many people, too many institutions, too many bureaucracies tripping over each other out there. I have the impression, and this is one question I wanted to ask you, that sometimes we set up one mechanism after another. It becomes a convenient way for each one to point the finger at the other.

Have you seen over the years the use of independent counsels as a way for administrations to themselves avoid making the tough prosecutorial decisions that really ought to be made?

Mr. DIGENOVA. Well, that's an interesting question. I'm not sure I'm an expert on the history of the statute in terms of the decision-making process and what might have motivated certain Attorneys General to turn to the statute. I mean obviously, in most instances, there has been a sufficiently widespread public debate about it, that certainly there were pressures brought to bear.

I would think that my experience over the years has been that the Department by and large was delighted to have some of these cases handled by an independent counsel, because they are not easy cases. It is not fun to be investigating public officials who may be a part of your administration. There is theoretically an inherent conflict of interest in some of that. So turning it over to someone to do it obviously makes life easier for an Attorney General and others.

But it is also true that sometimes the statute doesn't permit now, by the way it's drafted, the kind of courage that we would hope an Attorney General would have in a given case, to say that I don't believe the evidence warrants this, and I'm not going to seek the appointment of an independent counsel.

I would hope that everyone who holds that Office of Attorney General has the guts to do that, if the standard permits them to do that. The standard in this statute does not permit an Attorney General to do that. That is why it's bad, because it doesn't allow a courageous Attorney General to do the right thing. In fact, what it does do is it requires an Attorney General to do the wrong thing sometimes. That is bad legislation, in my book.

Mr. BARR. We have, and Judge Walsh, a former colleague of yours, Mr. Craig Gillen, is just down the hall testifying at another—before another panel today, not on these sort of issues, but he's now in private practice. He personifies, I think, as Mr. diGenova does, a cadre of some of the very best and most nonpartisan attorneys capable of investigating some of the matters, many of the matters perhaps that independent counsels do. That is our 93 U.S. attorneys and the many hundreds that assist U.S. attorneys.

Judge, in your opinion, could many of the matters that now are not routinely, because this still is not thankfully yet a routine use of Federal resources, independent counsels, but could some of these things very effectively and properly and ethically be handled by U.S. attorneys offices?

Judge WALSH. I think they could. At the beginning, after the Saturday night massacre in the Watergate case, I think there was such a strong reaction that that is what lead to the heavy use of this statute. Everyone wanted to be unlike what happened then when the President had the Attorney General, ultimately the Solicitor General fire an independent counsel.

I think that again, I hate to load all this on Jack Keeney, but he knows the Department so much better than I do.

Mr. BARR. He knows it better than any living human being.

Judge WALSH. I think that's perhaps true. He will know how it could be compartmented, so that this appearance of conflict could be greatly reduced, and the Attorney General and the political levels of the Department could perhaps be detached from the investigation that they would regard as embarrassing.

Mr. BARR. Thank you.

Mr. MCCOLLUM. Thank you, Mr. Barr.

Ms. Lofgren, you are recognized for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman. Looking at you, Judge Mikva, I am reminded that when this really began, you were sitting on the other side of this whole matter. You have had the opportunity to be a Member of Congress during the impeachment inquiry of President Nixon to be a judge, and be aware of the whole matter from that side. Then also to serve as I think a dollar a year man in the administration——

Judge MIKVA. They still owe me a dollar.

Ms. LOFGREN. Do they owe you the dollar? We'll take up a collection. So you've seen it from every angle. I remember back in those days in the 1970's that the thought was that this will lead to—the independent counsel methods would lead to increased confidence on the part of the American people, and of course justice. I am not sure that the American people are more confident now, as a consequence of this statute. I have heard from various panelists on both sides of this aisle, that justice may be an issue here in terms of results.

What I am wondering is what your idea would be of the concept of—I think you are in favor of this from your testimony, separating out garden variety misbehavior from the kind of conflict that really involves a very serious conflict between the branches of Government. Maybe the Iran-Contra issue versus somebody who is accused of being on the take. Everybody can understand if you steal some money, that's a crime. Prosecutors are very used to prosecuting crimes of theft. In my experience, are not unwilling to prosecute public officials when they commit the crime of theft, for example.

So if we could craft a statute first that limits the scope to what this was originally supposed to do. Then I'm thinking whenever you appoint someone to investigate it, I mean when you've got a conflict between branches of Government, it is inevitably a political matter. As soon as someone who is a prosecutor-like person, who is appointed to look at that, there is a whole segment of the public who immediately assumes that person is guilty.

I mean I remember ask the juror, do you think you can be fair in judging the defendant. Of course he wouldn't be here if he weren't guilty. There is that in some of us. Whether we might be better off having a permanent office that is made up of people who are political units, who have a great deal of integrity and expertise, but are not picked out and assigned and paid fees, but are just there. Sort of like the ethics unit, but not within the Justice Department. So that they might proceed in a way that is discrete, not issue reports or press conferences, but do the kind of investigative

work that might be of value to the various branches. Then inevitably, the political process may also need to come into play as well as potentially prosecutorial efforts.

What is your comment on that?

Judge MIKVA. Let me say first of all that your last comments I think very accurately describe the way the Office of Public Integrity works within the Department of Justice. For all except those constitutional crisis cases like Watergate and perhaps Iran-Contra, they are perfectly capable of ferreting out those instances of wrongdoing, even against high public officials.

I don't have to remind this committee that several of your former colleagues have been investigated, pursued, and prosecuted by the Department of Justice, even though they held high office in the Congress of the United States. The same is true of people in other branches of Government.

I think that the biggest single reform that is needed is to get the statute back to that very very unusual category of cases where the people just won't believe that even an office as chock full of integrity as the Office of Public Integrity, can really rise up and smite the President down, and smite the Attorney General down.

In those rare cases, I think the idea of a special counsel, an independent counsel makes sense. I don't think it's a good idea to set it up as a permanent party outside of the Department of Justice as a competing Department of Justice, but I think it is important to narrow the areas where you bring this process.

Ms. LOFGREN. I just wanted to ask further in terms of the appearance of conflicts, both political as well as legal, obviously it needs to be avoided, and whether we couldn't just use some version of the ABA model code as a guideline for judges as well as attorneys in that matter, which would obviously mean that money would be a problem. But if the issues were very limited, there are a lot of very excellent people who are public—such as yourself. I mean dollar a year men who are willing, because they love their country, to do the right thing. Would that not work?

Judge MIKVA. Thank you for your kind words. But I do think that we ought to apply whether it's the ABA standard of code of conduct or the judicial cannons. We just ought to make sure that whoever is involved in this process, whether it's the prosecutor as part of the appointing panel or anybody else, that they be expected to observe these high standards.

I was, I have to say, I was most distressed by one of the opinions of my former colleagues, which said that the appointing panel was not subject to the cannons of ethics that judges normally apply. Yes, this is a political process, but the whole purpose of this political process was to raise the process above suspicions that it was going to be decided on political ground. You can't do that. Then we might as well chuck the whole thing, what Mr. Olson would like to see us do.

Ms. LOFGREN. Thank you, Judge.

Mr. MCCOLLUM. Thank you very much, Ms. Lofgren.

Ms. Lee, you are recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I think that all of us would be honest to say that a lot of what we do in this process is political, but as well, it responds to the whims of the

American people. I have great confidence in the American people. So even their whims, I am responsive to.

Part of this, Judge Mikva, was to really isolate what you just said. To ensure the rareness of this process, that it should be attributable to a rare incident. It was done to ensure the American people would think and would feel confident that we were doing our job, that we were not covering up. I think that terminology came most glaringly of course during Watergate. We became sensitized, something that we had not seen in the last 50 years or so.

But now I am concerned, even with all of the scholarship and intellect, and I think we can say that the independent counsels who have served have come from premier backgrounds. We still have a situation now that frightens me in terms of the total discouragement of good people from serving in public life. We have watched some of the occurrences that have occurred in the past. We're watching some of them occur today.

So I have I think a broad question that I'd like all the gentlemen to answer. Is it Mr. diGenova, former independent counsel. I hope I have gotten part of that right.

Mr. DIGENOVA. That's OK. That's close enough.

Ms. JACKSON LEE. I like your vigorousness in terms of the fees being paid. I want to caution those who might be listening for them thinking, here they go again, throwing good money after bad. Folks have done bad things and here they are being compensated. I hope the American public can understand that justice is not cheap. But more importantly, justice is bankrupting. It is for those who have offered themselves in a public manner on compensation, salaries, that bespeak public service. It is also for those who are accused and may not be in essence convicted.

But the question becomes on the issue of the broadness of the scope. I know this has been discussed. But it results somewhat in the high cost to the taxpayer. I think that's where you get the sense of the taxpayer's attention. Is it good in the legislation that has been proposed that we in fact limit the scope of the independent counsel so that we are looking for items particularly in the area of their performance? I would even narrow it in their performance, not things that are floating around them, but in their performance exactly. And as well, that we ensure absolutely that it does not occur for items preceding their public service. That is one part of my question.

I didn't hear you respond to the more or less administrative part of what this bill does, the cost element for the resources that the independent counsel has. Do you think the limitation and a precise and finite budget is a good aspect of what we might be doing? If I might get answers from all.

Mr. DIGENOVA. I think again, I'm not offended by a budget. I have had to administer one as a U.S. attorney, and live within it. I have also seen what an independent counsel can do and what his needs are. I just think that we have to be careful. I think supervision of the budget, review of the budget—I don't think we should take away from an independent counsel the tools that he or she needs. Sometimes they may be very expensive.

Let me give you an example. This is all now public, so it's in the report. When I became independent counsel, an administration was

ending and a new administration was coming in. We had to issue subpoenas for lots of documents to President Bush and all of the people in that administration. We could not get certain information out of their computers, so we had no choice. We had to seize the computers, the hard drives. They were actually taken out of the computers by subpoena, by a Federal court. Later on, in order to reconstruct certain information, we had to try and reconstruct evidence that was on those hard drives that had been actually erased. It is possible, through very expensive methods, to reconstruct erased information, both E-mail and stuff that is from word processing.

The FBI did that for us. They did a brilliant job of reconstructing the erased information, but it cost a lot of money. It had to be done, because as a result of that we discovered some documents that were dated, which showed some people had actually told us the truth about what they were doing on a given day, and it helped prove their innocence.

You know, the cost of justice sometimes is high, but sometimes you have to do it. So I am for a budget. But I don't want to have caps on what an independent counsel can spend, because that can hurt people as well as help them. But I think budgets are fine. I think if an independent counsel can not justify to some budgetary authority what he or she needs, they probably should not be doing it.

Ms. JACKSON LEE. Judge Walsh.

Judge WALSH. I appreciate the question. The limitation that I suggest and a matter that concerns me is that after 2 years, having an independent counsel come before the Appropriations Committee to say may I continue or may I not, that draws the political judgment of the Congress into what should be a nonpolitical law enforcement problem. I think ordinarily when the Appropriations Committee passes on the requests of the Department of Justice as a whole, it's not that pinpointed. But what I think has to be avoided is anything that gives the Appropriation Committee pinpoint control over a single case or a single group of investigations.

So somehow, the independent counsel has to be insulated from that, because he's not a big department. Having a special appropriations hearing for him alone comes down to bringing political judgment into who should be prosecuted and who not. That is not a proper congressional matter I suggest or a political matter in the broad sense of the word. It should be encompassed somehow within the Department of Justice or the Administrative Office of the U.S. Courts which I know doesn't want it, or he should have to make his case administratively, but his case, it should not have to be made to Congress as a single item alone.

Mr. OLSON. I agree with that.

Judge WALSH. I think that requiring him to justify his position to the appointing court or at least have the administrative office and the General Accounting Office review what he is doing very regularly may serve that purpose without drawing an inappropriate political judgment into it.

Mr. DIGENOVA. Let me associate myself with Judge Walsh's remarks. I believe in budgetary review, but I do not believe in con-

gressional hearings on a specific investigation. That would be unacceptable.

Ms. JACKSON LEE. But a finite request to how you do your job, you wouldn't mind being finite or being precise in what you are needing the dollars for?

Mr. DIGENOVA. Well, you have to be very careful because if you start asking questions about an investigation, you might have information become public which is detrimental to the investigation, could ruin people's reputations, and could harm innocent people.

I think what the judge has suggested, which is a budgetary review by the appointing court, by the panel, because remember, it's a three judge panel, by the GAO and others, I think in terms of justifying need, I think would be very appropriate. But I think if you get an individual investigation into the budgetary process in Congress and the Appropriations Committee, I think that's very dangerous precedent. I don't think anybody would want that.

Judge MIKVA. I think the problem could be solved. I still favor the Administrative Office, even though I know they don't want it, because they have budgetary capacity. But whether it's the Administrative Office or the GAO, I don't think it ought to be the appointing court. They don't know a budget if it jumped off the table and hit them.

I think it is important that you not have an individual prosecution, an individual investigation be reviewed on a fiscal basis by the Congress. That would be like Congress going in and looking over a U.S. attorney investigating a particular criminal matter.

Mr. MCCOLLUM. When we recess now, we're going to be recessed unfortunately for about 45 minutes. I am wondering if Mr. Watt could——

Ms. JACKSON LEE. Can I just get—if Mr. Olson could answer.

Mr. MCCOLLUM. He can answer, but Mr. Watt was trying to get some time in, Ms. Lee, before we go.

Ms. JACKSON LEE. All right. That's fine. Let me just——

Mr. MCCOLLUM. Mr. Olson can answer, but let's see if we can make it on the time.

Mr. OLSON. I agree with what has been said. I don't think there's anything substantive that I can add to what has been said.

Ms. JACKSON LEE. I just will conclude by I'd like to have unanimous consent to submit an opening statement for the record. I may have some other questions that I'll put in writing.

Mr. MCCOLLUM. Without objection.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF HON. SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

This is an important hearing on the Independent Counsel Statute and on proposed legislation, H.R. 892, the Independent Counsel Accountability and Reform Act, to revise the law. I would like to thank all the witnesses for coming here this morning to give us their views on this bill and on the effectiveness of the rules and regulations governing the appointment and the operations of independent counsels. I look forward to hearing your testimony.

Ethics in government is critical to the success of our democratic form of government. Various surveys of public opinion indicate the low esteem in which many Americans hold elected and appointed officials. I believe that it is important that Congress and the executive and judicial branches of government have procedures in place to eliminate corruption and uphold the public trust. The responsibility of the

independent counsel is to hold our highest elected official, the President, his cabinet members and other high officials accountable to the law and to the American people.

All of us understand the necessity of appointing independent counsels to carry out this responsibility to ensure a fair and impartial investigation of the facts, when wrong doing is alleged. As members of Congress, we should always be concerned with the potential for independent counsels being appointed for partisan reasons and with attempts by independent counsels to exceed their authority. This is why the Congress revised the law in 1994.

We must carefully review the operation of this law and this oversight hearing will give us this opportunity.

When we consider legislation that impacts the political process and deals with competing constitutional powers, we must move with great caution and after extensive deliberation. We must not undermine public confidence in the government and in the credibility of the judicial process. However, the enormous expense of the independent counsel process that is generated, on the taxpayer, because the scope of the independent counsel may be unfairly broad, *must* be reviewed.

The Justice Department has some concerns about H.R. 892. I look forward to hearing their concerns. To some extent, we need to pay careful attention to their experience, but we must also create a positive atmosphere for good public servants to serve their country.

My concern is for fairness and for the pursuit of justice in implementing the independent counsel statute. I hope that my colleagues will also keep this principle in mind as we hold this hearing today.

Once again, thank you, Mr. Chairman, and I look forward to hearing testimony from the witnesses.

Mr. MCCOLLUM. Mr. Watt, you are recognized. I don't know if we can give you the full 5 minutes and still make the vote.

Mr. WATT. That's fine, Mr. Chairman. I really intended to abbreviate my comments and ask one question anyway. I think we've imposed on these gentlemen enough. I must say though that this has been one of the most impressive panels of witnesses I have ever seen come before either the subcommittee or the committee.

Seeing four lawyers sitting at a table does two things for me, especially when they are honest and open and nonpolitical, and tell us what their background is and where they come from on these issues and do it openly reminds me that lawyers really get bum raps more often than they ought to. The second thing it does is makes me miss the practice of law so much. It really does.

Question. There seems to be an iota of difference between Mr. Olson's theory that we ought to chuck the whole system that we have here and do away with the statute, and the other three panelists, who I think based on what I have heard have all now agreed that this statute is way too broad, covers too much territory, gives too much discretion, and there ought to be some more, much more clearly defined parameters to the statute.

Could I get the three gentlemen to comment first on Mr. Olson's theory that we ought to chuck the whole thing? Second, to give some content, specific content if you would, to the parameters, the outer parameters of what the new statute ought to be if we don't go all the way to where Mr. Olson has suggested we get to.

Judge MIKVA. Well, I certainly do not want to favor the repeal of the whole statute. I think that it did perform an important public service, and that it can again. But I think it needs to be limited.

I would limit it by looking again at the class of people that are covered by it. I think it's too broad as it is. I think it could be limited to the very top people in Government, recognizing that Justice can handle all the others.

I think it should be limited further by saying that it should deal with conduct in their performance of their duties as Federal offi-

cials. I think it should be limited by having the Attorney General say that he or she is satisfied that there's substantial evidence that crime has been committed, the same standard that would be used for bringing a matter to the grand jury. And in addition, I am very much in favor of Judge Walsh's queue at the end of that, and that an important public service will be achieved if a special prosecutor is appointed.

Judge WALSH. I agree with Judge Mikva. My only caution is that in attempting to hedge the independent counsel, you don't destroy his independence. You must not have an Independent Counsel Act which is in a sense a fraud on the public, where you really have a subservient prosecutor. Short of that, I think that we're—I don't see that. The only thing that could endanger that was that appropriations provision which I have already commented on. I agree with Judge Mikva in everything else he said.

Mr. DIGENOVA. I concur. As an intellectual matter, I could live without a statute, because in Teapot Dome and in Watergate, with Leon Jaworski and everything else, you know, when the problem is so big, nobody is ever going to be able to get away with it. It's just not going to happen. That is what makes this country so great. That is why we don't need this statute theoretically. But it's here. The political reality is, we're never going to get rid of this damn thing. So fix it.

Mr. MCCOLLUM. I believe we're going to have to run to vote. I don't want to keep this panel. We are going to reconvene in about 40 or 45 minutes, as soon as we finish this series of votes. But I want to thank all of you for coming. I have got two questions that I had hoped that you could respond to. Maybe we should do it in writing so I can race to get to the vote.

But one of them has to do with something that I picked up from Judge Walsh, where I questioned whether maybe we could be utilizing assistant U.S. attorneys to be some of the staffing of this. I'd like to see what you think of that.

The second question has to do with a question dealing with the power of the Attorney General and clarifying that courts shouldn't be perhaps reviewing decisions of the Attorney General to refer other matters to the independent counsel. I gather that's taken up a lot of time. I don't have time to get the response on the record from you today. But if you could respond, if I need to put it in writing I will. I want to thank all of you for coming very, very much. You have really contributed. But we've got to race to a vote.

This committee will be in recess until the votes are over.

[Recess.]

Mr. MCCOLLUM. The Subcommittee on Crime will come to order again. We have had a recess, a little bit more protracted than I would have liked, but we had votes on final passage of the farm bill. We had to be out for that period of time.

We have our final panel to introduce at this point. I would like for them to come forward, the three distinguished members of the panel, as I introduce them. The first one is John C. Keeney, Acting Assistant Attorney General for the Criminal Division at the Department of Justice. He has been an employee of the Justice Department for almost 45 years. Mr. Keeney has served as a Deputy Assistant Attorney General for the last 23 years, and has held nu-

merous positions within the Department, including Chief of the Fraud Section, and Deputy Chief of the Organized Crime and Racketeering Section. He holds a bachelors degree from the University of Scranton, a law degree from the Dickinson School of Law, and a masters of law degree from George Washington University.

Our second panelist is David L. Clark, the Director of Audit, Oversight and Liaison for the General Accounting Office. He has worked at GAO for over 20 years. He is primarily responsible for evaluating the work of Federal inspectors general, strengthening the auditing requirements over Federal financial assistance provided to State and local governments, performing financial audits of certain Government operations, including the offices of the independent counsels. Mr. Clark holds an undergraduate degree from Shepherd College and a graduate degree from George Washington University.

Our third panelist today on this final panel is Melvin J. Bryson, Jr., Chief of the Administrative Services Office at the Administrative Office of the U.S. Courts. Mr. Bryson has served previously in several positions at the Administrative Office, both in the Budget Division and in the Office of Program Assessments. Holds a bachelors degree in accounting from the University of Utah and a law degree from George Washington University.

I want to thank all three of you for being here. I apologize for the delays that we've had during the day. I assume some of you are familiar with the way Congress works, and it is not always an easy way to have the hearings. But these are exceedingly important, and we are very serious about the independent counsel law.

So with that in mind, I would like to proceed. I would say to all three of you that you may summarize your statements. All three of the statements will be admitted to the record in full without objection.

We'll start with you, Mr. Keeney, if we could.

STATEMENT OF JOHN C. KEENEY, ACTING ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. KEENEY. Thank you, Mr. Chairman. My statement is in the record. I'll try in about 2 minutes to summarize it.

The position of the Department is that we should wait until the reauthorization period comes up after the 5 years and see how the various oversight provisions in the 1994 act work out. We think that's a sensible approach, but I'm not sure that that's in listening to the testimony here to both the witnesses and the questions of the members, that that's the view of the committee.

I sensed an eagerness on the part of some members of the committee to proceed and try to amend the statute or reauthorize it. My suggestion would be rather than amending it piecemeal, if you are going to go ahead, I would suggest the reauthorization process and go into the whole thing in detail.

I don't think this is something where you can draft legislation based upon the testimony that you have had here today. I think you need extended testimony. If we got into a situation where reauthorization was being considered, we would have suggestions with respect to not only the scope of the statute. We think a lot of the

people who are covered by the statute, I agree with what was said here today, could be eliminated without doing any real damage.

Then as Mr. Scott pointed out, there is one provision in the present statute that is not very conducive to weeding out cases in the Department of Justice. That's the intent issue. The intent issue precludes the Attorney General from taking into consideration on making the decision as to whether or not to invoke the statute, conduct a preliminary investigation. She can not consider intent. She also can not consider intent in making the final decision as to whether or not to apply for an independent counsel, only until she considered, only if she can find clear and convincing evidence of lack of intent. That turns the normal criminal process on its head.

As you can appreciate a financial disclosure form that might be filed by any one of us, could have a mistake in there, even a glaring mistake. But as we all know, those are many many times just mistakes, errors. Having a requirement in there that the Attorney General have clear and convincing evidence of lack of criminal intent is a very difficult burden to meet.

That's all I want to say, Mr. Chairman. From the sense of the witnesses and from the sense of the questions that were asked, I divine that the committee is very interested in moving forward with respect to amendments in the statute now. I am suggesting to you that if you decide to do that, that this is a very technical interrelated statute. Any one provision that is amended could have potential impact throughout the statute. Therefore, I would recommend if you are going along that line, that you give serious consideration to extended hearings in a reauthorization.

The Department's position is that it's premature to do that right now. But I am mentioning that only because I think that if you are rushed into this, you might end up with a more difficult—with a difficult statute being even more difficult, even though you intend to try to straighten it out. Thank you.

[The prepared statement of Mr. Keeney follows:]

PREPARED STATEMENT OF JOHN C. KEENEY, ACTING ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee, thank you for inviting the Department of Justice to present its views in the course of your oversight of the Independent Counsel Reauthorization Act of 1994. My name is John C. Keeney, and I am the Acting Assistant Attorney General for the Criminal Division, which has ha responsibility for the administration of the Independent Counsel Act since its inception nearly two decades ago.

The Act was last reauthorized less than two years ago, when Congress thoroughly reviewed and evaluated most of the issues you have asked me to address today, so I have few new observations for you. The Department believes that any substantial changes in the Act at this point, such as those contained in H.R. 892, would be ill-advised at this time, and thus, unfortunately, we are unable to support this bill. We are providing for the hearing record a copy of our letter to Congressman Dickey, which sets forth our views on specific sections of his bill. However, I will respond to the questions outlined for the Department briefly, and would be happy to try to answer any questions you might have. I would like to caution you in advance, however, that there are a number of active independent counsel investigations underway, and I hope you will understand if I have to decline to answer specific questions because they tread too closely on open ongoing issues.

The first issue the Department was asked to address was whether we should have an Independent Counsel Act. Less than two years ago, when the Act was last reauthorized, the Attorney General testified that this Administration fully supports the Act. Although we are well aware that the functioning of the Act as part of our federal criminal justice system is not without its significant costs and burdens, it re-

mains our view that in the long run, the public confidence engendered by the Act outweighs its costs. However, we recognize that there may be a number of improvements that can be made in the process, and look forward to working with Congress over the coming years leading up to reauthorization to develop concrete proposals and solutions.

On the other hand, when dealing with a procedure as complex as the Independent Counsel Act, which delicately balances competing constitutional powers and which has a substantial history of interpretation, we generally do not recommend piecemeal legislative changes to seek to address perceived isolated problems. It is for this reason that we neither support H.R. 892, nor believe that the time is appropriate for wholesale changes in the Act.

You next request the Department's views on who should appoint independent counsels. Since the Act's inception in 1978, independent counsels have been appointed by a special 3-judge panel, named by the Chief Justice. We have very little information concerning the internal procedures used by the court in making its appointments. Although the choices of the panel have by and large been fine lawyers, the Department does have concerns about the appointment process, and would welcome efforts to streamline and standardize the procedure.

For example, we have been troubled by the length of time it has taken to make some appointments, which suggests to us that in some cases, the Court may have had substantial difficulty in identifying appropriate individuals who are able to serve. Rather than legislative changes at this point, however, we recommend a close examination of the entire issue of independent counsel appointments to develop recommendations to assist the Special Division in its difficult task. In the course of this examination, criteria for appointment could be recommended, procedures through which a broader range of qualified men and women could be identified, and standardized appointment forms that could be used to permit an expedited FBI background check of individuals under consideration by the court to assist it in its selection could be developed. Such an examination could also identify problems that have confronted the Court as it sought to make its appointments, and develop recommendations to resolve or avoid those problems in the future. Such a study could be of great value to Congress when it next comes time for reauthorization of the Act, if it is found that any legislative changes would be appropriate.

On the question of current standards under which appointment of an independent counsel is made, there is one substantial flaw in the statutory standards. Under current law, appointment is made if, following a preliminary investigation of up to 90 days, the Attorney General finds that further investigation is warranted of allegations against a covered person. The Department of Justice generally feels that this is an appropriate and workable standard, with one major exception—the handling of the issue of criminal intent.

Many federal crimes are defined by the existence of criminal intent; conduct which is either wholly innocent or at worst a regulatory matter is in many circumstances transformed into criminal conduct when committed knowingly and willfully. As a result, a decision whether further investigation of a potential crime is warranted generally will turn on whether the facts and circumstances suggest the possibility that the particular conduct under scrutiny may have been undertaken with the level of criminal intent required by the particular statute in question.

Under the current standards of the Independent Counsel Act, however, the Attorney General may decline to seek appointment of an independent counsel based on a conclusion that criminal intent is lacking only if she can cite "clear and convincing evidence" of that lack of intent. This is the *only* element of any crime that is treated in this extraordinary way, and it is a standard that turns the normal assessment of evidence in a criminal investigation on its head. Ordinarily, when deciding whether it is appropriate to invest the resources and subject an individual to the burdens of a criminal investigation, one looks for affirmative facts and circumstances suggesting that a crime may have been committed; it is not required that we affirmatively disprove all possibility of a crime by clear and convincing evidence.

For example, to return to the error in the financial disclosure form, if a preliminary investigation failed to develop any facts that would suggest that the error may have been deliberate, it would be a waste of limited federal resources and a wholly unfair burden on the individual who completed the form to escalate the investigation by appointment of an independent counsel. Nevertheless, absent "clear and convincing evidence" of inadvertence, which is obviously an extremely difficult standard to meet, that is exactly what must happen under the current version of the statute. As a result, there is a clear risk that independent counsels will be appointed to investigate matters that do not warrant further investigation, and in any event, it is inevitable that substantial investigative resources will be wasted in seeking to de-

velop "clear and convincing evidence" to support a manifestly appropriate conclusion that no independent counsel is needed.

The Department of Justice has long objected to this provision in the statute, and urges Congress to eliminate it. We therefore would welcome the repeal, at any time, of 28 U.S.C. section 592(a)(2)(B).

Finally, with respect to your question concerning fiscal controls, the Department believes that current fiscal controls, many of which were just adopted in the course of the recent reauthorization and thus have little if any established track record, appear to be more than adequate. We urge Congress not to burden independent counsels with excessive reporting requirements, which will be extremely expensive, will provide Congress and the public with little useful information, and will only divert these prosecutors from completing their work as expeditiously as possible. We also note that detailed disclosure of fiscal information in the context of a single criminal investigation may inadvertently result in the compromise of confidential investigative information; knowing where and how an investigation is spending money provides valuable information to those seeking to figure out where the investigation is going and which areas are under exploration.

We also strongly object to any fiscal control procedures through which Congress would find it necessary to insinuate itself into prosecutorial decision making in individual criminal cases through the appropriations process. H.R. 892, because it would require a specific, investigation-by-investigation appropriation, every two years, to support each independent counsel investigation, would inevitably lead to that result. In order to make a judgment as to whether the appropriation should be made and how large it should be, the Congress would have no choice but to inquire into the merits and progress of a particular open criminal investigation. This inevitable intrusion into and risk of direct interference with the investigation and prosecution of a particular criminal case—especially criminal cases that tend to be as sensitive and complex as are independent counsel investigations—by a political branch of government would be unprecedented and, in our view, wholly inappropriate.

This concludes my responses to your general inquiries, and I will be happy to try to address any questions you may have at this point.

Mr. MCCOLLUM. Thank you, Mr. Keeney.

Mr. Clark, you may give us your thoughts.

STATEMENT OF DAVID L. CLARK, DIRECTOR, AUDIT OVERSIGHT AND LIAISON, ACCOUNTING AND INFORMATION MANAGEMENT DIVISION, GENERAL ACCOUNTING OFFICE

Mr. CLARK. Thank you, Mr. Chairman. I do have a prepared statement that I would appreciate you putting into the record. I would like to offer a brief summary of the statement.

GAO is required by law to audit the expenditures of independent counsels from a permanent, indefinite appropriation. The counsels report on their expenditures every 6 months. We issue our reports 6 months after that. Our most recent report covered the 6-month period ended March 1995, and our report was issued in September 1995. We are currently auditing a 6-month period ended September 1995, and will issue our report for that period next month.

As you can see from the chart to your right, expenditures for independent counsel operations totaled $95 million for the 10-year period ended March 1995. The $95 includes $23 million from other agencies appropriations, primarily for the cost of FBI and other Federal agency detailees. Personnel compensation and benefits, including those for the detailees, are the single largest expense for independent counsels.

I'd like to point out, Mr. Chairman, that 3½ years ago, independent counsels had serious financial management weaknesses, including instances of noncompliance with laws and regulations relating to compensation, travel and procurement. Since then, independent counsels and the Administrative Office of the U.S. Courts, which provides administrative support and guidance, have taken signifi-

cant steps to improve their financial management. Today, independent counsels accurately account for their expenditures, they issue accurate reports, they have good financial management, and they are complying with laws and regulations. That concludes my summary.

[The prepared statement of Mr. Clark follows:]

PREPARED STATEMENT OF DAVID L. CLARK, DIRECTOR, AUDIT OVERSIGHT AND LIAISON, ACCOUNTING AND INFORMATION MANAGEMENT DIVISION, GENERAL ACCOUNTING OFFICE

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to discuss our financial audits of independent counsel expenditures. Specifically, I will discuss (1) independent counsels' financial reporting and auditing requirements, (2) expenditures for independent counsel operations for the 10year period ended March 1995, and (3) independent counsels' compliance with financial laws and regulations.

REPORTING AND AUDITING REQUIREMENTS

Independent counsels are required by law to prepare statements of their expenditures from a permanent, indefinite appropriation. GAO is required by law to audit those reports. The reports cover the 6-month periods ended March 31 and September 30. Independent counsels are required to prepare their reports within 3 months after the end of the 6-month period, and we are required to issue our audit reports within 3 months after that. Our last audit report was for the 6-month period ended March 1995, and was issued in September 1995.[1] We are currently auditing independent counsel reports prepared in December 1995 for the 6-month period ended September 1995, and plan to issue our audit report by the end of March 1996.

Our audit objectives are to determine whether independent counsels' expenditure reports are reliable. We also review the internal control structure over independent counsel expenditures and test for compliance with selected provisions of laws and regulations. We do not evaluate the efficiency or effectiveness of independent counsel operations.

In addition to independent counsels' offices, we also perform audit work at the Department of Justice and the Administrative Office of the United States Courts (AOUSC). The law directs Justice to pay all costs relating to the establishment and operation of independent counsel offices. A permanent, indefinite appropriation has been established by law to pay all necessary independent counsel expenses.

The Independent Counsel Reauthorization Act of 1994 directed AOUSC to provide administrative support and guidance to independent counsels. Prior to the act, AOUSC provided services to independent counsels pursuant to formal agreement with Justice. Justice periodically disburses lump-sum payments from the permanent, indefinite appropriation to AOUSC for independent counsel expenditures. Independent counsels submit financial information to AOUSC, which expends funds on independent counsels' behalf and records the expenditures in its accounting systems. AOUSC also prepares monthly summarized expenditure reports and submits them to independent counsels. Independent counsels have generally fulfilled their financial reporting requirements by using the summarized expenditure reports prepared by AOUSC.

Lastly, we obtain, but do not audit, information on the costs of independent counsel operations that are not paid from the permanent, indefinite appropriation. These costs relate primarily to employees assigned to work with independent counsels from other federal agencies, such as the Federal Bureau of Investigation.

INDEPENDENT COUNSEL EXPENDITURES

Enclosed is a schedule of independent counsel expenditures for the 10-year period ended March 1995. The schedule was compiled from reports we have issued on expenditures by the independent counsels who have been active since establishment of the permanent, indefinite appropriation in 1987.[2] We are unable to verify most

[1] *Financial Audit: Expenditures by Six Independent Counsels for the Six Months Ended March 31, 1995* (GAO/AIMD–95–233, September 29, 1995).

[2] Financial audit of expenditures by independent counsels (GAO/AFMD–93–1, October 9, 1992; GAO/AFMD–93–60, April 21, 1993; GAO/AIMD–94–76, April 15, 1994; GAO/AIMD–95–85,

Continued

of the totals on the schedule because of the poor condition of independent counsel records prior to 1992. Also, the totals for some of the independent counsels include unaudited information.

The schedule shows that expenditures for independent counsel operations total led approximately $95 million for the 10-year period ended March 1995. Personnel compensation and benefits, including compensation and benefits for employees assigned to work with independent counsels from other federal agencies such as the Federal Bureau of Investigation, accounted for most of the $95 million.

In our 1992 audit of independent counsels, we reported that poor financial records and serious internal control weaknesses resulted in inaccurate financial reports.[3] These weaknesses included inadequate procedures to ensure that expenditures were recorded properly and inadequate segregation of duties. These weaknesses have been largely resolved. For example, some independent counsels have hired a financial officer, established more effective accounting systems, reconciled information in their accounting systems with AOUSC reports, and better segregated accounting duties. AOUSC has improved accounting systems related to independent counsel expenditures and taken other administrative steps such as establishing centralized oversight of independent counsel transactions.

In our last audit report, we noted one remaining weakness in the processing and summarizing of independent counsel expenditures, but pointed out that independent counsels and AOUSC have taken steps to resolve the weakness. The weakness resulted from certain independent counsels submitting incorrect information to AOUSC, and from AOUSC incorrectly recording information submitted by independent counsels. To resolve this weakness, certain independent counsels have begun utilizing the services of a financial consultant to assist them in accounting, including determining that transactions have been recorded properly and reconciling independent counsel financial records with AOUSC records. AOUSC has hired a senior staff member with accounting and financial reporting expertise to review AOUSC records before they are provided to independent counsels.

COMPLIANCE WITH LAWS AND REGULATIONS

In our 1992 audit of independent counsels, we found that some expenditures were inconsistent with laws and regulations relating to compensation, travel, and procurement. For example, we found that 489 out of 522 travel transactions we examined lacked written authorizations or approvals, and that one independent counsel received $78,000 in unallowable reimbursements for meals and lodging. Some of the instances we identified may have been attributable to an oversight or ambiguities in the independent counsel law and a lack of comprehensive guidance to help independent counsels understand and follow operational and administrative legal requirements. Other instances were caused by independent counsels relying on erroneous advice from AOUSC.

Independent counsels have taken steps to better ensure compliance with laws and regulations through a number of steps including the development of handbooks and other written guidance. Moreover, the Congress addressed many of the problems we found when it enacted the Independent Counsel Reauthorization Act of 1994. The act requires independent counsels to generally comply with the established policies of the Department of Justice regarding expenditure of funds and by establishing additional restrictions on compensation and travel. In our last four audits, our tests for compliance with selected provisions of laws and regulations have disclosed no reportable instances of noncompliance by independent counsels.

Mr. Chairman, this concludes my statement. I would be pleased to respond to questions.

March 31, 1995; GAO/AIMD–95–112, March 31, 1995; GAO/AIMD–95–113, March 31, 1995; and GAO/AIMD–95–233, September 29, 1995).

[3] *Financial Audit: Expenditures by Nine Independent Counsels* (GAO/AFMD–93–1, October 9, 1992)

INDEPENDENT COUNSELS
SCHEDULE OF EXPENDITURES
FOR THE PERIOD 6/11/85 - 3/31/95

Counsel	Personnel Compensation & Benefits	Travel	Rent, Communications, & Utilities	Contractual Services	Supplies & Materials	Acquisition Of Capital Assets	Administrative Services	Other Operating Costs (Unaudited)	Total Costs
Adams	9,815,000	839,000	2,322,000	4,561,000	132,000	316,000	592,000	4,436,000	23,013,000
diGenova	1,342,000	60,000	380,000	65,000	9,000	70,000	89,000	326,000	2,341,000
Fiske	1,059,000	369,000	203,000	143,000	46,000	543,000	0	3,593,000	5,956,000
Harper	0	8,000	2,000	9,000	0	0	1,000	30,000	50,000
McKay	1,481,000	106,000	482,000	178,000	50,000	128,000	66,000	305,000	2,796,000
Morrison	940,000	59,000	408,000	32,000	20,000	30,000	37,000	615,000	2,141,000
Seymour	1,006,000	174,000	70,000	93,000	18,000	59,000	40,000	92,000	1,552,000
Silverman	0	3,000	2,000	2,000	0	0	0	0	7,000
Smaltz	499,000	133,000	32,000	38,000	31,000	292,000	45,000	376,000	1,446,000
Starr	770,000	281,000	272,000	156,000	70,000	172,000	61,000	6,935,000	8,717,000
Walsh	22,809,000	1,271,000	10,264,000	3,418,000	634,000	1,253,000	1,011,000	6,731,000	47,391,000
Sealed 1989	10,000	0	2,000	3,000	0	0	0	0	15,000
Sealed 1991	37,000	0	39,000	9,000	0	5,000	3,000	0	93,000
TOTAL	**39,768,000**	**3,303,000**	**14,478,000**	**8,707,000**	**1,010,000**	**2,868,000**	**1,945,000**	**23,439,000**	**95,518,000**

This schedule was compiled from reports we have issued on expenditures by independent counsels who have been active since establishment of the permanent indefinite appropriation in 1987. We are unable to verify most of the totals on the schedule because of the poor condition of independent counsel records prior to 1992. Also, the totals for some of the independent counsels include unaudited information.

Mr. MCCOLLUM. Thank you very much, Mr. Clark.
Mr. Bryson.

STATEMENT OF MELVIN J. BRYSON, JR., CHIEF, ADMINISTRATIVE SERVICES OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Mr. BRYSON. Thank you, Mr. Chairman, members of the subcommittee. As indicated, I am responsible for the services that are provided by the Administrative Office to the independent counsel offices. I am appearing today on behalf of the Director of the Administrative Office, Ralph Mecham, who deeply regrets that he is unable to be here today. We do appreciate this opportunity to present to you the views of the Judicial Conference on the proposed legislation.

The Judicial Conference, which is our governing body, continues to oppose those parts of section 594 of the act, which required Administrative Office to provide financial and administrative support, as well as guidance regarding executive branch regulations to independent counsels. If I might just read the resolution of the Judicial Conference.

"Resolved: That the mission of the Administrative Office of the United States Courts and its component units is incompatible with responsibilities for, or activities in support of prosecutorial functions of Government such as those of independent counsels, and that any such prosecutorial entity that currently exists or that is created by Congress should not rely on the Administrative Office or any of its component parts for administrative functions, policy guidance, review, or any other ongoing or intermittent support."

In recent years, the Congress has seen fit to divert the efforts of the Administrative Office, not only into serving the needs of the independent counsels, but also into establishing the National Fine Center for the purpose of assisting the Department of Justice collect criminal fines. The Judicial Conference opposes these two hybrid interbranch arrangements because among other things, they are offensive to the fundamental doctrine of separation of powers.

We recognize that the Office of Independent Counsel is somewhat of an anomaly in our constitutional system of three coequal branches of Government. Because of this, early in the program the services of the Administrative Office were volunteered on a temporary basis to the Department of Justice to provide administrative support to independent counsels. Then, despite the objection of the Judicial Conference, that responsibility was memorialized by statute in 1994.

From the beginning of this support, we attempted to use Administrative Office employees to assist the independent counsels. The support and guidance provided to them is not based on policies and practices of the judicial branch, but rather on policies and practices of the executive branch, primarily the Department of Justice. When the General Accounting Office first audited the independent counsels as Mr. Clark indicated, it criticized the Administrative Office for administrative deficiencies in carrying out executive branch practices, not the judicial branch procedures with which our people are familiar.

In response to that audit and the 1994 act, employees with expertise and experience in executive branch practices have been retained. Currently, the Administrative Office has five full-time positions funded and devoted exclusively to independent counsel service. Additionally, a number of regular employees support this effort on a part-time basis. This arrangement is satisfactory from a management point of view, when as we have had during the past couple of years, a number of independent counsels are operating concurrently.

However, in the future, and it seems to be the sense of the discussion we've had here today, there may be periods of time when independent counsel activity slows or ceases entirely. The Administrative Office would then be faced with letting our designated staff go for lack of work, or we could attempt to retrain and absorb them into our normal work. But in an agency as small as the Administrative Office, the latter possibility is very problematic.

The problem then becomes what happens when new independent counsels are named, and we need to then go out and get staff and gear up again to support them. This is a very difficult management problem with no ready solution.

We respectfully recommend the subcommittee consider the option of transferring the responsibility of supporting the independent counsels to the General Services Administration's External Services Program. For over 30 years, this program has provided expert accounting, payroll, personnel, and administrative services to dozens of nonpermanent Federal boards and commissions of every size, type and mission. As GSA says in their published information on this program, "They—the serviced entities—get on-time, on-demand, at-cost, dependable service, and the kind of individual attention they need to meet their unique responsibilities."

We believe that this program has a sufficient staff size and workload to be flexible in response to either decreases or increases in the independent counsel activity if that responsibility was added to their current jurisdiction.

Let me stop at that point. If you have questions or——

[The prepared statement of Mr. Bryson follows:]

PREPARED STATEMENT OF MELVIN J. BRYSON, JR., CHIEF, ADMINISTRATIVE SERVICES OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Mr. Chairman and members of the Subcommittee, I am Melvin J. Bryson, Jr., Chief of the Administrative Services Office of the Administrative Office of the United States Courts. I am responsible for the services currently provided by the Administrative Office to the Offices of Independent Counsel.

I am appearing on behalf of the Director of the Administrative Office, Ralph Mecham, who deeply regrets that he is unable to be here today. The Director and I appreciate the opportunity to present to you the views of the Judicial Conference of the United States on certain provisions of the Independent Counsel Reauthorization Act of 1994 ("Act") and H.R. 892, the "Independent Counsel Accountability and Reform Act of 1995".

As the members of this Subcommittee know, the Judicial Conference of the United States is made up of twenty-seven Article III judges, including its presiding officer, the Chief Justice of the United States. The Judicial Conference, pursuant to statute, sets policy for the governance of the Judiciary. The Administrative Office provides administrative, financial, and other support services to the federal judiciary under the supervision of the Judicial Conference.

The Judicial Conference recognizes that evaluating the independent counsel program is the responsibility of Congress. However, the Judicial Conference continues to oppose those parts of Section 594(1)(2) and (3) of the Act which require the Ad-

ministrative Office to provide financial and administrative support as well as guidance regarding Executive Branch regulations to independent counsels. The Resolution of the Judicial Conference follows:

> *Resolved:* That the mission of the Administrative Office of the United States Courts and its component units is incompatible with responsibilities for, or activities in support of prosecutorial functions of government such as those of Independent Counsels, and that any such prosecutorial entity that currently exists, or that is created by the Congress, should not rely on the Administrative Office or any of its component parts for administrative functions, policy guidance, review or any other ongoing or intermittent support.

The Administrative Office was established by Congress in 1939 to promote efficiency within the Judicial Branch. Our agency has less than 900 employees, virtually all of whom are organized and trained to assist the federal courts. In recent years, Congress has seen fit to divert the efforts of the Administrative Office, not only into serving the needs of the independent counsels, but also into establishing the National Fine Center for the purpose of assisting the Department of Justice collect criminal fines. The Judicial Conference opposes these two hybrid inter branch arrangements because, among other things, they are offensive to the fundamental doctrine of separation of powers.

We recognize that the Office of Independent Counsel is somewhat of an anomaly in our Constitutional system of three co-equal branches of government. Because of this, early in the program the services of the Administrative Office were volunteered on a temporary basis to the Department of Justice to provide administrative support to independent counsels. Then, despite the objection of the Judicial Conference, that responsibility was finally memorialized by statute in 1994.

From the beginning, we attempted to use Administrative Office employees to assist the independent counsels. The support and guidance provided to them is not based on policies and practices of the Judicial Branch, but rather on policies and practices of the Executive Branch, primarily the Department of Justice. When the General Accounting Office first audited the independent counsels, it criticized the Administrative Office for administrative deficiencies in carrying out Executive Branch practices, not the Judicial Branch procedure with which they were familiar.

In response to that audit and the 1994 Act, employees with expertise and experience in Executive Branch practices were retained. Currently the Administrative Office has five full-time positions funded and devoted exclusively to independent counsel service. Additionally, a number of regular employees support this effort on a part-time basis. This arrangement is satisfactory from a management point of view when, as we have had during the past years, a number of independent counsels operating concurrently.

However, in the future, there may be periods of time when independent counsel activity slows or ceases entirely. We would then be faced with letting our designated staff go for lack of work, or attempt to retrain and absorb them into our normal work. In an agency as small as the Administrative Office, the latter possibility is very problematic. Then, when and if independent counsel activity resumes, we would have to immediately re-establish a special staff. This is a difficult management problem with no ready solution

We respectfully recommend the Subcommittee consider the option of transferring the responsibility of supporting the independent counsels to the General Services Administration's External Services Program.

For over thirty years, this program has provided expert accounting, payroll, personnel, and administrative services to dozens of non-permanent federal boards and commissions of every size, type, and mission. As GSA says in their published information on this program: "They (the serviced entities) get on-time, on-demand, at cost, dependable service, and the kind of individual attention they need to meet their unique responsibilities."

We believe that this program has a sufficient staff size and workload to be flexible in response to either decreases or increases in the independent counsel activity if that responsibility was added to their current jurisdiction. Also, the expertise and experience needed to service independent counsels is compatible with the regular mission of this GSA program.

We recognize that H.R. 892 addresses the current problem the Administrative Office encounters in procurement of space for independent counsels. We now serve as a middleman between the independent counsels and the GSA when there is no reason to have a middleman. Transferring this responsibility to the GSA External Services Program is appropriate. As I stated above, we believe that this GSA program

is already structured to provide for space, furniture, office necessities, and other administrative and financial support required by independent counsels.

In summary, on behalf of the Judicial Conference and the Administrative Office, I respectfully request that this Subcommittee take action to amend the Independent Counsel Reauthorization Act of 1994 to eliminate Judicial Branch responsibility to provide support and guidance to the Office of Independent Counsel. The Administrative Office should be allowed by Congress to devote all of its human and financial resources to serving the federal judiciary.

Thank you for the opportunity to testify today. I'd be pleased to attempt to answer any questions the members of the Subcommittee may have.

Mr. MCCOLLUM. Thank you very much, Mr. Bryson. I do have some questions of all of you. I think I'll start with a couple of the technical questions.

You have made an interesting suggestion. Do you think that it would be, Mr. Bryson, more cost efficient if the Government were to lease or to build a permanent space that independent counsels could use in the future, as well as other nonpermanent Federal boards or commissions from your experience?

Mr. BRYSON. Mr. Chairman, I guess our experience would show that under the current climate, GSA has sufficient space available for independent counsel offices or other such entities, that it would be perhaps not a good utilization of funds to build a new space. There is a lot of GSA space available throughout this city and in other places.

Mr. MCCOLLUM. One of the things raised to us earlier by the panel that preceded you was a question of the need for secure space for classified materials. The fact that every time a new independent counsel comes along, one of the biggest expense items he's usually got is setting that up. I assume GSA doesn't have a lot of that sort of space just running all over the place. Do you have any thoughts about that?

Mr. BRYSON. GSA does not that we are aware of. I have been involved in the independent counsel activities for the last 4 years. So we've had the opportunity to set up new offices for several of the recent independent counsels.

There is time between that period when an independent counsel is requested and when one is finally named, were GSA to find space and in most cases, begin to set it up as a secure facility. We have had that responsibility over the past couple of years, and we have done that. That is something that is very doable. It means you need to move quickly. You have to identify the space. You have to have experts in security matters who can come in and look at what the needs are, but it can be done quickly.

Mr. MCCOLLUM. But is that exceptionally expensive, as one of them suggested a minute ago, if it involves a secured space?

Mr. BRYSON. If in fact you have to build what they call a skiff for documents, that is expensive. We have done that on two occasions, once for Mr. diGenova and one of the other independent counsels. It is expensive, but it's probably not as expensive as having that space sitting idle until you have someone to fill it.

Mr. MCCOLLUM. Mr. Clark, are the amounts represented in other operating costs on your chart over here paid out of the permanent and definite appropriation for independent counsels?

Mr. CLARK. On that chart they are not. I would point out though that independent counsels have begun to enter into memorandums of understanding with other Federal agencies to begin reimbursing

those other agencies for some of the costs for detailees. But on this chart, the $23 million is outside the permanent, indefinite appropriation.

Mr. MCCOLLUM. And most all of that money under that column is for detailees?

Mr. CLARK. Most of it is for detailees. Most of the detailees are from the FBI.

Mr. MCCOLLUM. Do we detail any assistant U.S. attorneys?

Mr. CLARK. Yes. There are eight agencies that have provided detailees. I will give you that list. FBI; the Department of Justice, that is investigative staff; IRS; the Agriculture Inspector General; Postal inspectors; Customs; the HUD Inspector General, and the Department of Education Inspector General.

Mr. MCCOLLUM. Now why are these unaudited? I mean the nature of this is such that you wouldn't audit it or what?

Mr. CLARK. First of all, the independent counsels are only required to report under law on their expenditures from the permanent and definite appropriation, and that is our audit requirement. We have insisted, and counsels agree, that their financial statements would be much more informative if they included information on costs from other appropriations.

For us to audit, again we're not required to do that, but for us to audit those costs, we would have to do audit work at those eight agencies that I just mentioned. For example, we'd have to verify the FBI figures. That's not to say that we haven't looked at the figures and looked at their reasonableness. We just haven't done the kind of audit work that we would have to do.

As counsels begin reimbursing those agencies out of the permanent, indefinite appropriation, we in fact will have to do more audit work.

Mr. MCCOLLUM. I'd like to ask some staffing questions. I wanted to ask some of that of Mr. Keeney and perhaps Mr. Bryson, but I am going to yield to Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. I think my questions—I have a number of questions. I think they are kind of brief.

Mr. Clark, when the independent counsel starts, does he have a person in his staff to help with the budget?

Mr. CLARK. I am not aware that independent counsels actually prepare a formal budget. They do have accounting staff.

Mr. SCOTT. OK.

Mr. CLARK. I go back to my point that counsels, including Mr. Starr, are able to account for their costs, and they do a good job of that.

Mr. SCOTT. How are the detailees hired? Do they call the FBI and the FBI sends over somebody or is there a hiring process?

Mr. CLARK. Under the law, the FBI has to provide the assistance to the counsels if the counsels request it. I am not aware of whether counsels actually get into a determination of which agents come on board.

Mr. SCOTT. Mr. Keeney, is there any reason for security or preparation in the case why the independent counsel should not have all of their budget on budget, and some apparently is on budget and some looks like it's off budget?

Mr. KEENEY. I don't think so, Mr. Scott. The only problem I see with respect to the budgeting is where you are involved in a renewal. If that renewal, whether it be by Congress or by the court, includes an inquiry into the work of the independent counsel, we have a concern about that, as another branch interfering with the prerogatives and responsibilities of an executive branch agency, which the independent counsel is.

Mr. SCOTT. It's kind of a hybrid, because——

Mr. KEENEY. It's a hybrid, yes. But it's carrying on an executive function, Mr. Scott.

Mr. SCOTT. When the question for renewal comes up, we have kind of gone back and forth. But it is my understanding that the court would decide whether or not the independent counsel can continue. Who gets to decide—who should decide whether the special prosecutor should continue?

Mr. KEENEY. Well, there should be a report submitted. Well, the statute requires a report to be submitted to the court and ultimately to the Congress.

Our concern in this area is that no one that—no outside agency, no outside component of Government should be able to be in a position—I think this has been expressed by some of the independent counsel, overseeing the independent counsel by appropriations or otherwise in a manner that would interfere with their independence.

Mr. SCOTT. So that therefore the special counsel should not have to come before an Appropriations Committee to justify their work. But what about the judge? Going back before the judge and say I need 6 more months or I need another year or two to finish this. The judge would have the authority to approve or disapprove a continuation of the special prosecutor, special counsel.

Mr. KEENEY. There is no termination provision in there right now, Mr. Scott. I think that's one of the things that the Congress should address, as to how they are going to handle budgets for the independent counsel.

Mr. SCOTT. The Attorney General or the court on its own motion can terminate the counsel's appointment on the grounds that the counsel's work is complete.

Mr. KEENEY. Yes.

Mr. SCOTT. Mr. Keeney——

Mr. KEENEY. I'm sorry, Mr. Scott. Apparently I misunderstood. I wasn't focusing on termination. I was focusing more on a renewal aspect.

Mr. SCOTT. The threshold question of whether or not there ought to be a special counsel appointed, you have agreed that limiting the Attorney General's discretion on the intent removes the common sense appointment or not appointing a special prosecutor. You would trust the Attorney General to use good judgment in that, because that good judgment is backed up with the judicial—with the legislative oversight?

Mr. KEENEY. It is. Now I recognize the background on this. The reason that provision is in there goes back to one of the early judgments by an Attorney General with respect to declining to seek an independent counsel on the basis of lack of criminal intent. Congress disagreed with that judgment.

My suggestion is that if they disagree with the judgment that they handle it in a different fashion than taking this authority away from the Attorney General, which has the potential of screening out numbers of cases that probably shouldn't be in the system.

Mr. SCOTT. Mr. Chairman, I have two other questions. Thank you. Question of attorneys' fees. We have discussed earlier the question of whether or not the defendant's attorneys fees ought to be covered because of the—when a special prosecutor is appointed, whoever the target is is generally bankrupt on the spot. Question of attorneys fees on that, whether the defendant is guilty or innocent.

Mr. KEENEY. Well, there's a provision in the present statute with respect to attorneys' fees. I think as was pointed out here by Mr. Olson, it comes into play in situations where except for the independent counsel statute, the individual would not have been subject to investigation. The issue of attorneys' fees is a very difficult one.

Mr. SCOTT. If a person is found guilty right now, are they entitled to attorneys' fees?

Mr. KEENEY. No.

Mr. SCOTT. Not at all? And what Mr. Olson was suggesting would be a change in the present law?

Mr. KEENEY. I wasn't sure that I understood exactly what he was saying, Mr. Scott.

Mr. SCOTT. Well, do you support the idea that a person who but for the special prosecutor, would not have incurred additional fees? Those fees ought to be reimbursed, guilty or innocent?

Mr. KEENEY. If he's found innocent, yes.

Mr. SCOTT. What about if he is found guilty?

Mr. KEENEY. I don't think so, sir.

Mr. SCOTT. The argument is that if it had been a routine case of theft, he would have had a routine prosecution and would have paid a few thousand dollars and then taken his punishment. Whereas with a special prosecutor, he is going to have to run up hundreds of thousands of dollars' worth of legal bills.

Mr. KEENEY. It's true. Mr. Scott, this——

Mr. SCOTT. And therefore, just the appointment of the special counsel essentially puts him into involuntary bankruptcy.

Mr. KEENEY. Well, it has a severe impact on him, that's clear. But what we are dealing with, when we're giving attorneys' fees to a subject of an independent counsel, we are giving a class preference to high level executive people that are not generally given in the criminal justice system. It's a difficult question. I do not know the answers.

Mr. SCOTT. And should the independent counsel be full-time or not full-time?

Mr. KEENEY. Well, my preference would be that he be full-time. But let me suggest a problem with that. Our experience with the special court is that they at times have very great difficulty in getting the type of lawyer they want to act as independent counsel. That is because so many lawyers don't want to give up their practice.

I think that's something that if the committee wanted to pursue it, they should discuss it with the special court, what their experi-

ence has been in trying to get independent counsel. Some of them have taken several months to get an attorney. It may be that they would have some suggestions with respect to that.

Mr. MCCOLLUM. Thank you, Mr. Scott.

Mr. Keeney, it has been suggested to us that there is a problem out therein the independent counsel law in relationship to where the Attorney General has the authority under the statute to refer other related matters to the independent counsel, and that courts are getting involved a lot now in questioning the Attorney General's authority or the extent to which it is really related.

I am wondering what you think about restrictions on review of this and to allow the Attorney General's decision to stand without review if she chooses to refer a matter to this independent counsel, it may be up in the course of his investigation he discovers something else, and she says, "OK, you handle that instead of the local U.S. attorney."

Mr. KEENEY. The position we have taken with respect to that is that the Attorney General should make the determination as to what is a related matter. If she agrees that it's a related matter, she so apprises the special court.

Mr. MCCOLLUM. And it should be final?

Mr. KEENEY. My position is that it should be final, Mr. McCollum. There are people who disagree with me.

Mr. MCCOLLUM. Well, I think that there is a question in the courts right now as to interpreting the intent of Congress on this issue. Reading the statute, I understand why there might be some ambiguity. But it wasn't ambiguous when we did it. We intended her to have that final authority, I'm sure, being through the process. But we may need to amend the statute to make that clear.

One other area somewhat related to that. Do you think the Attorney General should have the power as Mr. Hyde suggests, to issue subpoenas for documents during the course of a preliminary investigation?

Mr. KEENEY. It would be helpful in one particular independent counsel matter that I am familiar with. If we had subpoena power, we could have disposed of the matter and closed it without bringing an independent counsel in. It would be helpful.

Mr. MCCOLLUM. And what about the question of changing the threshold to make it something different than it is today as far as the threshold inquiry is concerned? Mr. Hyde suggests that we change the language to allow the inquiry only when there is specific evidence from a credible source that a Federal criminal law has been violated. In other words, narrowing the scope and making the number of cases fewer that you would bring under this than the broader language that currently exists in statute today.

Mr. KEENEY. My personal opinion is that we can live with the specific information from a credible source. What we do with respect to an independent counsel matter, as well as with any other criminal matter of significance, is we look at it and make a prosecutor's determination as to whether or not it should be pursued. We do that in the context of the Independent Counsel Act, by for 30 days conducting an inquiry to determine specificity and credibility of the source. So that's at least in my judgment, not a big problem.

Mr. MCCOLLUM. All right. I follow you. I guess the question here was simply our feeling comfortable with trying to make sure the scope is narrowed. The statute is broader than perhaps you do, than perhaps the way you conduct it.

One last question that may apply to all three of you is related to an issue Judge Walsh raised. Upon reviewing it in the interim when we had this last recess, it would appear that maybe the problem he foresaw has already been remedied by the 1994 act. But he suggested to us during his testimony earlier that there was a problem of having to go out and hire so many staff attorneys, that he couldn't get many to come. In the 1994 act, I read and I know that it's true, at the request of an independent counsel, prosecutors as well as administrative personnel and other people, may be detailed by the Department of Justice.

Has that remedied the problem Judge Walsh was concerned with, that he expressed to us today, Mr. Keeney? Or do any of you know that? Do we have enough resources for the Justice Department to detail all the special assistant counsels, the attorneys, assistant U.S. attorneys to assist the independent counsels activity?

Mr. KEENEY. We might have a problem in supplying all his staff, but we have detailed and have now on detail attorneys from the Criminal Division to several independent counsel. So we do detail.

Mr. MCCOLLUM. But the question of supplying them all, you might have a problem if he requested too many of them.

Mr. KEENEY. We might have, but I must say, I have never focused on that. The downside of that is that the independent counsel is supposed to be independent. If he's supported fully by Department of Justice people, there might be an appearance of non-independence. That's the only thing that strikes me.

Mr. MCCOLLUM. Well, the only reason I ask it is if it would save us some money and some costs and so forth. It seems to me that professional assistant U.S. attorneys, as opposed to those who are upstairs and guiding the policy making of the Justice Department. Usually the professional assistant U.S. attorneys, there is no question in anyone's mind about their independence and their credibility.

Mr. KEENEY. Well, we have detailed, when I said Criminal Division, I didn't mean to exclude there. We have detailed assistant U.S. attorneys.

Mr. MCCOLLUM. We'll want to pursue that further with you. Whether it's through another hearing or maybe informally, I'd just like to know what the status is and the various one, and to the degree to which that problem still exists possibly out there.

Well, I think I've about run out my bounds with those. The only other question I have is related to personnel. It's really—before we do that, I'll ask Mr. Bryson this, and then I'll turn to you, Mr. Scott.

Would it be more efficient to have permanent support staff for independent counsels, do you think, Mr. Bryson? Now we're not talking about prosecutors.

Mr. BRYSON. We have wrestled a good bit in the Administrative Office with how to provide the best support to the independent counsel. The act of 1994 of course requires them now to have an administrative officer and a certifying officer and also requires

them to follow certain standard executive branch laws. That has done a great deal to, if you will, regularize their operations.

From our standpoint, if you are going to have fewer independent counsel, then it makes sense to look at some other entity to support the independent counsels in the administrative areas. Whether you set up a new independent group to do that, or you go with something that is already existing like the GSA External Services Program, that is a choice that Congress obviously has to make.

We think if there's a group like that out there that does that kind of support, that that makes sense. It's there, they service people in exactly the same way that we're attempting to do, and they are in place all the time.

Mr. MCCOLLUM. I understand that the courts are generally concerned about the temporary duty you have to perform before GSA gets hold of these matters. That's a big problem for you.

Mr. BRYSON. It is.

Mr. MCCOLLUM. Mr. Clark, you've got the microphone up there. Do you care to comment on any of these personnel questions or the staffing questions, or what would be most efficient?

Mr. CLARK. The only comment I would make is that to the extent there is continuity of administrative staff from an audit point of view, from a financial reporting point of view, and from an auditing point of view, that is the best for us. When you see a lot of independent counsels being appointed and terminated and people coming in new, there's a lot of confusion. That was the case 3½ years ago.

We are very comfortable with the people that we are dealing with at the Administrative Office and in the independent counsel community. You see the same people at the administrative level in the community. To the extent we can keep that uniform, I think that goes a long way toward making——

Mr. MCCOLLUM. The real issue I guess would be that there could be a time when you had no independent counsels. There could be a time when people didn't have a job in that regard if you hired permanent personnel. Now we haven't had that for a while, but a lot of us believe that we have too broad a range and that independent counsel should be appointed less frequently anyway. So that raises both specters.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I just wanted to ask, Mr. Clark indicated that the financial situation has settled down. We have had allegations of expenditures well in excess of what may have been necessary, hotel rooms, meals, and that kind of thing. Is the appropriateness of the expense as well as the documentation of the expense part of your audit?

Mr. CLARK. Both of those are part of our audit. Independent counsels now are subject to pretty much the same rules and regulations that any executive branch employee would be subject to.

Mr. SCOTT. So when you say the GAO was satisfied, they are also satisfied that of the appropriateness, not just the documentation?

Mr. CLARK. That is correct.

Mr. SCOTT. Finally, Mr. Keeney, did you comment on whether or not you felt prior acts ought to be covered, acts of Government offi-

cials that occurred prior to their Government service, ought to be covered by the special prosecutor?

Mr. KEENEY. My own view, Mr. Scott, is that the conflict exists, conflict of interest exists with the Attorney General and the Cabinet officer, whoever it might be, irrespective of whether the conduct took place while the subject was in Government service or prior to that service.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. MCCOLLUM. Thank you very much, Mr. Scott. I want to thank the panel for coming today. You have been very patient. You sat through a great deal of this today, but I hope it was of interest and benefit to you since you are all involved in this issue.

Mr. Keeney, in particular, I want to comment that when I began the hearing this morning, it was improbable that I thought we were going to mark a bill up this Congress, but there is somewhat of a consensus that I sensed today among the witnesses and among the members of both sides of the aisle here about a number of these matters. If we could reach an understanding and the Justice Department could support us on marking up some legislative initiatives that would remedy three or four of these problems that are there that there is some consensus on, then this committee would be I think doing a good job and an appropriate public job by going ahead with some legislation this term.

So I might suggest that rather than trying to be elaborate in holding larger number of hearings, that you and I and others at the Justice Department talk about this and see if we can come up with something that meets some of the things you heard today. If there's something else we need to do, we'll be glad to. But it would be a shame if we have a productive opportunity in the legislative arena to do something everybody thinks we should do if we just passed it by. The year is short, so if we start getting any extended hearings, I think it will be difficult, because of the election year we are in.

So anyway, having said that, I want to thank all of you for coming. We had a very productive day. I think we've learned a lot about the problems of the independent counsel law, and probably gained some insights into what we can do to correct those problems. Certainly I feel better for having done this, and I think the public is served better for having had these hearings.

Thank you again. This subcommittee hearing is adjourned.

[Whereupon, at 3:30 p.m., the subcommittee adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING

United States General Accounting Office

GAO

Report to Congressional Committees

September 1995

FINANCIAL AUDIT

Expenditures by Six Independent Counsels for the Six Months Ended March 31, 1995

GAO/AIMD-95-233

GAO

United States
General Accounting Office
Washington, D.C. 20548

Accounting and Information
Management Division

B-265988

September 29, 1995

Congressional Committees

Enclosed is our opinion on the statements of expenditures by six independent counsels for the 6 months ended March 31, 1995, as well as our consideration of the internal control structure for this audit period. This report also discusses our evaluation of the counsels' compliance with laws and regulations for the 6 months ended March 31, 1995. This review was required by 28 U.S.C. 596(c)(2), as amended, and Public Law 100-202.

We are sending copies of this report to the Attorney General, the Director of the Administrative Office of the U.S. Courts, the six independent counsels included in our audit, and other interested parties. Copies will be made available to others upon request.

David L. Clark
Director, Audit Oversight and Liaison

Contents

Abbreviations

AOUSC	Administrative Office of the U.S. Courts
FBI	Federal Bureau of Investigation

GAO

United States
General Accounting Office
Washington, D.C. 20548

Accounting and Information
Management Division

B-265988

Congressional Committees

This report presents the results of our audits of expenditures[1] reported by six independent counsels for the 6 months ended March 31, 1995. The Department of Justice and the independent counsels are required under 28 U.S.C. 594 (d)(2), (h), and 596 (c)(1) as amended by section 3 (i) of the Independent Counsel Reauthorization Act of 1994, to report on expenditures from a permanent, indefinite appropriation established within Justice to fund independent counsel activities. To satisfy the requirements of 28 U.S.C. 596 (c)(2), as amended, and Public Law 100-202, we audit the statements of expenditures prepared by independent counsels.

We found that the statements of expenditures presented in appendixes I through VI for independent counsels Arlin M. Adams, Joseph E. diGenova, Robert B. Fiske, Jr., Donald C. Smaltz, Kenneth W. Starr, and Lawrence E. Walsh, respectively, were reliable in all material respects. Our audit also included limited tests of internal controls that disclosed a material weakness in internal controls over reporting of expenditures. As a result of this weakness, we extended our substantive testing in order to opine on the expenditure reports presented in the appendixes to this report. Further, our audit included limited tests of compliance with laws and regulations that disclosed no reportable noncompliance with laws and regulations we tested.

The following sections provide background information, outline each conclusion in more detail, and discuss the scope of our audits.

Background

The independent counsel provisions of the Ethics in Government Act of 1978 (28 U.S.C. 591-599) established a process for the appointment of independent counsels so as to preserve and promote the accountability and integrity of public officials and of institutions of the federal government. The law provides for the judicial appointment of temporary independent counsels when the Attorney General determines that reasonable grounds exist to warrant further investigation of high-ranking government officials for certain alleged crimes.

On June 30, 1994, the Independent Counsel Reauthorization Act of 1994 (Public Law 103-270) was enacted, reauthorizing the independent counsel law for an additional 5 years. The independent counsel law directs the

[1]The term expenditures as used in this report generally means cash disbursed

Department of Justice to pay all costs relating to the establishment and operation of independent counsel offices and designates specific responsibilities to the Administrative Office of the United States Courts (AOUSC) for independent counsels' administrative support. Justice periodically disburses lump-sum payments to AOUSC for this purpose. In 1987, Public Law 100-202 established a permanent, indefinite appropriation within Justice to fund expenditures by independent counsels. Independent counsels are required to report their expenditures from the appropriation for each 6-month period in which they have operations. We are required to audit expenditures from the independent counsel appropriation and to report our findings to appropriate committees of the Congress.

In January 1994, Justice determined that the appropriation established by Public Law 100-202 to fund expenditures by independent counsels appointed under 28 U.S.C. 591-599, could also fund the expenditures of Robert B. Fiske Jr., who was appointed as a regulatory independent counsel[2] by the Attorney General in January 1994. Since we are required to audit all expenditures from that appropriation, the expenditures Mr. Fiske's office made during this audit period are covered by this report. Also, in March 1994, Lawrence E. Walsh's independent counsel office closed; however, certain costs incurred prior to the closing of his office and paid by AOUSC after Mr. Walsh's operations ceased, are covered by this report.

During any 6-month period, independent counsels may also incur other significant costs that are paid from appropriations other than the permanent, indefinite appropriation established to fund independent counsel activities. These costs arise, for example, from the use of detailees from other federal agencies, such as the Federal Bureau of Investigation (FBI). Independent counsels are not required to and do not include such costs in their reports on expenditures. However, these other significant costs are identified and discussed in the notes to the statements of expenditures presented in the appendixes to this report.

Opinion on Statements of Expenditures

The statements of expenditures for independent counsels Arlin M. Adams, Joseph E. diGenova, Robert B. Fiske, Jr., Donald C. Smaltz, Kenneth W. Starr, and Lawrence E. Walsh present fairly, in all material respects, the respective expenditures of these independent counsel offices for the 6

[2]Regulatory independent counsels are appointed pursuant to 5 U.S.C. 301, 28 U.S.C. 509, 510, and 543. See also 28 C.F.R. Parts 601 and 603 (1994).

months ended March 31, 1995. The statements of expenditures and related notes regarding the basis of accounting and additional pertinent information are in appendixes I through VI.

Consideration of Internal Control Structure

For this audit period, the internal controls we considered for each of the five active independent counsels, and for AOUSC and Justice regarding the administrative support and accounting services they perform for independent counsels, were those designed to

- safeguard assets against loss from unauthorized use or disposition;
- assure the execution of transactions in accordance with management authority and with laws and regulations; and
- properly record, process, and summarize transactions to permit the preparation of expenditure statements in accordance with the applicable basis of accounting.

In this audit period, we continued to find a material weakness in internal controls over the reporting of expenditures. A material weakness is a condition in which the design or operation of one or more of the internal control structure elements does not reduce to a relatively low risk that errors or irregularities in amounts that would be material to the expenditure statements may occur and not be detected promptly by employees in the normal course of their duties.

Independent counsel offices submit payment vouchers, payroll information, and supporting documentation to AOUSC. On the independent counsels' behalf, AOUSC expends funds and records the expenditures in its payroll and accounting systems. AOUSC also prepares monthly summarized expenditure reports and submits them to the independent counsels. Justice performed similar functions for Mr. Fiske's independent counsel office.

Independent counsels have generally fulfilled their financial reporting requirements by using the summarized expenditure reports prepared by AOUSC. During this audit period, and as discussed in our prior reports,[3] AOUSC expenditure reports had errors, requiring us to propose—and independent counsels to accept—audit adjustments. These errors were caused by certain independent counsels submitting incorrect information to AOUSC, or by AOUSC incorrectly recording information submitted by

[3]Financial audit of expenditures by independent counsels (GAO/AFMD-93-1, October 9, 1992, GAO/AFMD-93-60, April 21, 1993, GAO/AIMD-94-76, April 15, 1994, GAO/AIMD-95-85, March 31, 1995, GAO/AIMD-95-112, March 31, 1995, and GAO/AIMD-95-113, March 31, 1995)

independent counsels. We believe that independent counsels may continue to experience problems reporting their expenditures until they and AOUSC establish effective internal controls for accurately processing and summarizing independent counsel expenditures.

Subsequent to the audit period, and prior to the completion of our audit, we noted that AOUSC and certain independent counsels had taken additional steps to improve internal controls over financial reporting. AOUSC hired a senior staff member with accounting and financial reporting expertise whose duties include the review of monthly AOUSC reports prior to their submission to independent counsels. Also, certain independent counsels utilized the services of a financial consultant to review transactions for appropriate line-item coding prior to their submission to AOUSC for payment and to review AOUSC reports and reconcile them to independent counsel records.

Compliance With Laws and Regulations

Our audit tests for compliance with selected provisions of laws and regulations disclosed no instances of noncompliance that would be reportable under generally accepted government auditing standards. However, the objective of our audit was not to provide an opinion on overall compliance with laws and regulations. Accordingly, we do not express such an opinion.

Objectives, Scope, and Methodology

In order to carry out their financial operations and to ensure accountability, independent counsels are responsible for

- preparing statements of expenditures,
- establishing and maintaining internal controls and systems to provide reasonable assurance that the internal control objectives previously mentioned are met, and
- complying with applicable laws and regulations.

We are responsible for obtaining reasonable assurance about whether the statements of expenditures reported by independent counsels are reliable (free of material misstatement and presented fairly in accordance with the basis of accounting described in the accompanying notes). Also, we are responsible for considering the internal control structure in order to determine our auditing procedures for expressing an opinion on the statements of expenditures, not to provide assurance on the internal

control structure. In addition, we are responsible for testing compliance with selected provisions of laws and regulations.

In order to fulfill these responsibilities, for each independent counsel, we

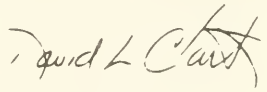
- examined, on a test basis, evidence supporting the amounts and disclosures in the statement of expenditures and notes thereto, except items indicated as unaudited;
- assessed the accounting principles used and significant estimates made by management;
- evaluated the overall presentation of the statement of expenditures;
- obtained an understanding of the design of relevant internal control structure policies and procedures, determined whether they had been placed in operation, assessed the associated control risk, and conducted limited tests of relevant internal controls, including those over expenditure authorizations and financial reporting; and
- tested compliance with certain aspects of selected provisions of the independent counsel provisions of the Ethics in Government Act of 1978 (28 U.S.C. 591-599), 5 U.S.C. Chapter 55, and implementing regulations, relating to pay administration.

It is important to note that because of inherent limitations in any internal control structure, losses, noncompliance, or misstatements may nevertheless occur and not be detected. Also, projecting any evaluation to future periods is subject to the risk that controls may become inadequate because of changes in conditions or that the degree of compliance with controls may deteriorate. As a result of the material internal control weakness over reported expenditures previously discussed, we extended our substantive testing in order to opine on the expenditure reports presented in the appendixes.

We obtained, but did not audit, information on costs that were not paid from the permanent, indefinite appropriation established to fund independent counsel activities. We obtained information on these costs from the independent counsel offices; Justice, including the FBI; the Internal Revenue Service; the Office of Inspector General of the Department of Housing and Urban Development; the Office of Inspector General for the Department of Agriculture; the Office of Investigations for the U.S. Customs Service; and the Postal Inspection Service.

We discussed the results of our work with the six independent counsels or their representatives and representatives of AOUSC and Justice, and incorporated their comments where appropriate.

We performed our audits in accordance with generally accepted government auditing standards.



David L. Clark
Director, Audit Oversight and Liaison

August 31, 1995

List of Committees

The Honorable Mark O. Hatfield
Chairman
The Honorable Robert C. Byrd
Ranking Minority Member
Committee on Appropriations
United States Senate

The Honorable Ted Stevens
Chairman
The Honorable John Glenn
Ranking Minority Member
Committee on Governmental Affairs
United States Senate

The Honorable Orrin G. Hatch
Chairman
The Honorable Joseph R. Biden
Ranking Minority Member
Committee on the Judiciary
United States Senate

The Honorable Robert L. Livingston
Chairman
The Honorable David R. Obey
Ranking Minority Member
Committee on Appropriations
House of Representatives

The Honorable William F. Clinger
Chairman
The Honorable Cardiss Collins
Ranking Minority Member
Committee on Government Reform and Oversight
House of Representatives

The Honorable Henry J. Hyde
Chairman
The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
House of Representatives

Appendix I

Statement of Expenditures for Independent Counsel Adams

STATEMENT OF EXPENDITURES FOR INDEPENDENT COUNSEL ADAMS

ARLIN M. ADAMS

Office of Independent Counsel

Statement of Expenditures
(Cash basis)

Six Months Ended March 31, 1995

Personnel compensation and benefits	$ 535,580
Travel	27,209
Rent, communications, and utilities (note 2)	185,199
Contractual services (note 3)	274,264
Acquisition of capital assets (note 4)	7,064
Administrative services (note 5)	49,496
Total expenditures	**$1,078,812**

The accompanying notes are an integral part of this statement.

ARLIN M. ADAMS

Office of Independent Counsel

Notes to Statement of Expenditures

Note 1 - Accounting policies

Reporting entity. The accompanying statement of expenditures presents the expenditures of the Office of Independent Counsel - Arlin M. Adams (OIC-Adams) for the 8 months ended March 31, 1995. The statement of expenditures includes only expenditures made from the permanent, indefinite appropriation for the offices of independent counsel that are processed through the Administrative Office of the U.S. Courts (AOUSC) and the OIC. Mr. Adams was appointed on March 1, 1990, to investigate the administration of various programs of the Department of Housing and Urban Development (HUD) from 1983 to 1989. On May 15, 1995, Mr. Adams resigned his appointment, effective July 3, 1995. Lawrence Thompson was appointed to continue this investigation on May 31, 1995.

Basis of accounting. The accompanying statement of expenditures was prepared principally on the cash basis of accounting, which is a comprehensive basis of accounting other than generally accepted accounting principles. Under this method, except for payroll and employee benefits, expenditures are recorded when the funds are disbursed by AOUSC or, for noncash transfers, when charged by AOUSC. Most payroll and related employee benefits are recorded at the end of the pay period when earned. The cost of purchased capital assets, which principally consist of office equipment and furniture, is recorded in the statement of expenditures when paid. These assets will remain with the federal government when they are no longer needed by the OIC.

Note 2 - Rent, communications, and utilities

Approximately $160,000 in office rent is included in rent, communications, and utilities.

Note 3 - Contractual services

Contractual services primarily consists of litigation support services

Note 4 - Acquisition of capital assets

These assets remain the property of the federal government at the conclusion of the investigation.

Note 5 - Administrative services

AOUSC receives an administrative fee equal to 3 percent of OIC expenditures for performing disbursement and accounting functions for OIC-Adams. Payment of these fees generally occurs in the month following the services. Also included in administrative services are other costs, amounting to $17,558, incurred by AOUSC in providing administrative guidance and support to independent counsel offices. These costs were certified by AOUSC, paid from the independent counsel appropriation, and allocated to the OIC.

Note 6 - Other operating costs (unaudited)

Certain costs relating to employees assigned to work with the OIC by the Federal Bureau of Investigation (FBI) and the Inspector General of the Department of Housing and Urban Development (HUD IG) were financed through funds appropriated to these agencies and, accordingly, are not included in the statement of expenditures. These agencies are not reimbursed for these costs. The schedule below shows the estimated costs (unaudited) of the assistance provided to the OIC during the 6-month period, based on information provided by officials of these agencies.

	Costs (unaudited)
FBI	$ 92,000
HUD IG	83,000
	$175,000

Appendix II

Statement of Expenditures for Independent Counsel diGenova

STATEMENT OF EXPENDITURES FOR INDEPENDENT COUNSEL diGENOVA

JOSEPH E. diGENOVA

Office of Independent Counsel

Statement of Expenditures
(Cash basis)

Six Months Ended March 31, 1995

Personnel compensation and benefits	$233,898
Travel	3,799
Rent, communications, and utilities (note 2)	74,119
Contractual services and supplies (note 3)	3,159
Administrative services (note 4)	20,591
Total expenditures	**$335,666**

The accompanying notes are an integral part of this statement.

JOSEPH E. diGENOVA

Office of Independent Counsel

Notes to Statement of Expenditures

Note 1 - Accounting policies

Reporting entity: The accompanying statement of expenditures presents the expenditures of the Office of Independent Counsel - Joseph E. diGenova (OIC-diGenova) for the 6 months ended March 31, 1995. The statement of expenditures includes only expenditures made from the permanent, indefinite appropriation for the offices of independent counsel that are processed through the Administrative Office of the U.S. Courts (AOUSC) and the OIC. Mr. diGenova was appointed on December 14, 1992, to investigate a preelection search of passport files. OIC-diGenova's investigation is ongoing.

Basis of accounting: The accompanying statement of expenditures was prepared principally on the cash basis of accounting, which is a comprehensive basis of accounting other than generally accepted accounting principles. Under this method, except for payroll and employee benefits, expenditures are recorded when the funds are disbursed by AOUSC or, for noncash transfers, when charged by AOUSC. Most payroll and related employee benefits are recorded at the end of the pay period when earned.

Note 2 - Rent, communications, and utilities

Approximately $60,000 in office rent is included in rent, communications, and utilities.

Note 3 - Contractual services and supplies

Contractual services and supplies consist primarily of court reporting services and office supplies.

Note 4 - Administrative services

AOUSC receives an administrative fee equal to 3 percent of OIC expenditures for performing disbursement and accounting functions for OIC-diGenova. Payment of these fees generally occurs in the month following the services. Also included in administrative services are other costs, amounting to $12,251, incurred by AOUSC in providing administrative guidance and support to independent counsel offices. These costs were certified by AOUSC, paid from the independent counsel appropriation, and allocated to the OIC.

Appendix III

Statement of Expenditures for Independent Counsel Fiske

STATEMENT OF EXPENDITURES FOR INDEPENDENT COUNSEL FISKE

ROBERT B. FISKE, JR

Office of Independent Counsel

Statement of Expenditures
(Cash basis)

Six Months Ended March 31, 1995

Personnal compensation and benefits	$128,858
Travel	75,311
Rent, communications, and utilities (note 2)	41,982
Contractual services (nota 3)	53,646
Supplies and materials	10,628
Acquisition of capital assets (note 4)	41,582
Total expenditures	**$352,007**

The accompanying notes are an integral part of this statement.

ROBERT B. FISKE, JR.

Office of Independent Counsel

Notes to Statement of Expenditures

Note 1 - Accounting policies

Reporting entity. The accompanying statement of expenditures presents the expenditures of the Office of Independent Counsel - Robert B. Fiske, Jr. (OIC-Fiske) for the 6 months ended March 31, 1995. The statement of expenditures includes only expenditures made from the permanent, indefinite appropriation for OIC-Fiske processed through the Department of Justice.

Robert B. Fiske, Jr., was appointed by Attorney General Janet Reno on January 24, 1994, to investigate criminal and civil violations of the U.S. Code in Re: Madison Guaranty Savings and Loan. On August 5, 1994, pursuant to 28 U.S.C. 592 (c)(1)(A), as amended by Public Law No. 103-270, the U.S. Court of Appeals for the District of Columbia appointed Kenneth W. Starr to conduct the investigation. After completing a transition of operation to Mr. Starr, Robert B. Fiske, Jr., terminated his appointment on October 6, 1994.

Basis of accounting. The accompanying statement of expenditures was prepared principally on the cash basis of accounting, which is a comprehensive basis of accounting other than generally accepted accounting principles. Under this method, expenditures are recorded when the funds are disbursed by the Department of Justice. Most payroll and related employee benefits are recorded at the end of the pay period when earned. Although Mr. Fiske terminated his appointment on October 6, 1994, most of the costs included in this statement of expenditures reflect costs incurred prior to his termination, yet paid during the current period.

Note 2 - Rent, communications, and utilities

This amount consists primarily of printing costs and copier equipment rental.

Note 3 - Contractual services

Contractual services include litigative and office support services.

Note 4 - Acquisition of capital assets

The capital assets expenditures are for office furniture and equipment. These assets have been transferred to the investigation headed by Independent Counsel Kenneth W. Starr.

Appendix IV

Statement of Expenditures for Independent Counsel Smaltz

STATEMENT OF EXPENDITURES FOR INDEPENDENT COUNSEL SMALTZ

DONALD C. SMALTZ

Office of Independent Counsel

Statement of Expenditures
(Cash basis)

Six Months Ended March 31, 1995

Personnel compensation and benefits	$ 478,135
Travel	133,172
Rent, communications, and utilities (note 2)	32,010
Contractual services (note 3)	37,648
Supplies and materials	30,704
Acquisition of capital assets (note 4)	291,706
Administrative services (note 5)	39,884
Total expenditures	**$1,041,259**

The accompanying notes are an integral part of this statement.

DONALD C. SMALTZ

Office of Independent Counsel

Notes to Statement of Expenditures

Note 1 - Accounting policies

Reporting entity: The accompanying statement of expenditures presents the expenditures of the Office of Independent Counsel - Donald C. Smaltz (OIC-Smaltz) for the 6 months ended March 31, 1995. The statement of expenditures includes only expenditures made from the permanent, indefinite appropriation for the offices of independent counsel that are processed through the Administrative Office of U.S. Courts (AOUSC) and the OIC. Mr. Smaltz was appointed on September 9, 1994, to investigate activities of a former Secretary of the Department of Agriculture. OIC-Smaltz's investigation is ongoing.

Basis of accounting: The accompanying statement of expenditures was prepared principally on the cash basis of accounting, which is a comprehensive basis of accounting other than generally accepted accounting principles. Under this method, except for payroll and employee benefits, expenditures are recorded when the funds are disbursed by AOUSC or, for noncash transfers, when charged by AOUSC. Most payroll and related employee benefits are recorded at the end of the pay period when earned.

Note 2 - Rent, communications, and utilities

Approximately $5,000 in office rent is included in rent, communications, and utilities. The office moved in December 1994 and rent charges for the new location were not paid as of the end of the period.

Note 3 - Contractual services

Contractual services includes investigative and court reporting services.

Note 4 - Acquisition of capital assets

The capital assets expenditures are for computer hardware and software and office furniture and equipment. These assets remain the property of the federal government at the conclusion of the investigation.

Note 5 - Administrative services

AOUSC receives an administrative fee equal to 3 percent of OIC expenditures for performing disbursement and accounting functions for OIC-Smaltz. Payment of these fees generally occurs in the month following the services. Also included in administrative services are other costs, amounting to $16,403, incurred by AOUSC in providing administrative guidance and support to independent counsel offices. These costs were certified by AOUSC, paid from the independent counsel appropriation, and allocated to the OIC.

Note 6 - Other operating costs (unaudited)

Certain costs relating to employees assigned to work with the OIC by the Federal Bureau of Investigation (FBI), U.S. Customs Service, the Department of Agriculture, the Internal Revenue Service (IRS), and the Postal Inspection Service, were financed through funds appropriated to these agencies and, accordingly, are not included in the statement of expenditures. These agencies were not reimbursed for these costs. The schedule below shows the estimated costs (unaudited) of the assistance provided to the OIC during the 6-month period, based on information provided by officials of these agencies.

	Costs (unaudited)
FBI	$180,000
Other Justice	49,000
Agriculture	57,000
Postal Inspection	51,000
IRS	23,000
Customs	16,000
	$376,000

Appendix V

Statement of Expenditures for Independent Counsel Starr

STATEMENT OF EXPENDITURES FOR INDEPENDENT COUNSEL STARR

KENNETH W. STARR

Office of Independent Counsel

Statement of Expenditures
(Cash basis)

Six Months Ended March 31, 1995

Personnel compensation and benefits	$ 734,471
Travel	278,708
Rent, communications, and utilities (note 2)	272,173
Contractual services (note 3)	138,429
Acquisition of capital assets (note 4)	171,834
Supplies and materials	48,140
Administrative services (note 5)	54,811
Total expenditures	**$1,698,566**

The accompanying notes are an integral part of this statement.

KENNETH W. STARR

Office of Independent Counsel

Notes to Statement of Expenditures

Note 1 - Accounting policies

Reporting entity: The accompanying statement of expenditures presents the expenditures of the Office of Independent Counsel - Kenneth W. Starr (OIC-Starr) for the 6 months ended March 31, 1995. The statement of expenditures includes only expenditures made from the permanent, indefinite appropriation for the offices of independent counsel that are processed through the Administrative Office of U.S. Courts (AOUSC) and the OIC. Mr. Starr was appointed on August 5, 1994, to assume the investigation of possible violations of federal criminal law in Re: Madison Guaranty Savings and Loan Association and other entities, which was begun by regulatory Independent Counsel Robert B. Fiske, Jr.

Basis of accounting: The accompanying statement of expenditures was prepared principally on the cash basis of accounting, which is a comprehensive basis of accounting other than generally accepted accounting principles. Under this method, except for payroll and employee benefits, expenditures are recorded when the funds are disbursed by AOUSC or, for noncash transfers, when charged by AOUSC. Most payroll and related employee benefits are recorded at the end of the pay period when earned.

Note 2 - Rent, communications, and utilities

Approximately $195,000 in office rent is included in rent, communications, and utilities.

Note 3 - Contractual services

Contractual services primarily consists of consulting services in support of litigation.

Note 4 - Acquisition of capital assets

The capital assets expenditures are for office furniture and equipment. These assets will remain the property of the federal government at the conclusion of the investigation.

Note 5 - Administrative services

AOUSC receives an administrative fee equal to 3 percent of OIC expenditures for performing disbursement and accounting functions for OIC Starr. Payment of these fees generally occurs in the month following the services. Also included in administrative services are other costs, amounting to $23,697, incurred by AOUSC in providing administrative guidance and support to independent counsel offices. These costs were certified by AOUSC, paid from the independent counsel appropriation, and allocated to the OIC.

Note 6 - Other operating costs (unaudited)

Certain costs relating to employees assigned to work with the OIC by the Department of Justice, the Federal Bureau of Investigation (FBI), and the Internal Revenue Service (IRS) were financed through funds appropriated to these agencies and, accordingly, are not included in the statement of expenditures. These agencies are not reimbursed for these costs. The schedule below shows the estimated costs (unaudited) of the assistance provided to the OIC during the 6-month period, based on information provided by officials of these agencies.

	Costs (unaudited)
Justice	$ 84,000
FBI	4,306,000
IRS	439,000
	$4,829,000

Appendix VI

Statement of Expenditures for Independent Counsel Walsh

STATEMENT OF EXPENDITURES FOR INDEPENDENT COUNSEL WALSH

LAWRENCE E. WALSH

Office of Independent Counsel

Statement of Expenditures
(Cash basis)

Six Months Ended March 31, 1995

Personnel compensation and benefits (note 2)	$28,511
Rent, communications, and utilities (note 3)	3,478
Administrative services (note 4)	6,228
Total expenditures	$38,217

The accompanying notes are an integral part of this statement.

LAWRENCE E. WALSH

Office of Independent Counsel

Notes to Statement of Expenditures

Note 1 - Accounting policies

Reporting entity: The accompanying statement of expenditures presents the expenditures of the Office of Independent Counsel - Lawrence E. Walsh (OIC-Walsh) for the 6 months ended March 31, 1995. The statement of expenditures includes only expenditures made from the permanent, indefinite appropriation for the offices of independent counsel that are processed through the Administrative Office of U.S. Courts (AOUSC). Mr. Walsh was appointed on December 19, 1986, to investigate allegations of crimes relating to the sales of arms to Iran; the diversion of funds to, and other support of, the Nicaraguan Contras; and the prosecution of any indictments stemming from the investigation. Mr. Walsh's final report covering his independent counsel activities was released to the public by the U.S. Court of Appeals for the District of Columbia Circuit on January 18, 1994. Mr. Walsh's office officially closed on March 30, 1994.

Basis of accounting: The accompanying statement of expenditures was prepared principally on the cash basis of accounting, which is a comprehensive basis of accounting other than generally accepted accounting principles. Under this method, expenditures are recorded when the funds are disbursed by AOUSC or, for noncash transfers, when charged by AOUSC. When active, Mr. Walsh's office used the modified cash basis of accounting and accrued and reported certain expenses prior to payment.

Note 2 - Personnel compensation and benefits

AOUSC paid $28,511 in unemployment costs for former OIC-Walsh employees. These costs may continue in future periods depending upon the former employees' status.

Note 3 - Rent, communications, and utilities

As noted in footnote 1, OIC-Walsh accrued certain expenses and reported those expenses when accrued. As a result of changing the basis of accounting from the modified cash to the cash basis, payments totaling $3,027 were recorded. They previously had been reported at $5,120.

Note 4 - Administrative services

AOUSC receives an administrative fee equal to 3 percent of OIC expenditures for performing disbursement and accounting functions for OIC-Walsh. Payment for administrative service fees includes fees for expenditures reported in September 1994. Fees for expenditures reported in March 1995 will be recorded in April 1995.

Note 5 - Legal representation fees

Upon the request of an individual who was the subject of an independent counsel's investigation but who was not indicted, a special division of the U.S. Court of Appeals for the D.C. Circuit may award reimbursement of reasonable attorney's fees to that individual. During the 6-month period ended March 31, 1995, approximately $80,260 in awarded legal representation fees were paid from a special judgment fund established for such reimbursements. Accordingly, the legal representation fees are not included in the statement of expenditures.

Note 6 - Retroactive retirement coverage

As discussed in prior notes to statements of expenditures, certain employees of the office of independent counsel with qualifying appointments were erroneously not provided retirement coverage. AOUSC began processing retroactive retirement adjustments for these employees during fiscal year 1994. AOUSC is continuing to process retroactive retirement adjustments; however, none were recorded in the current period. We anticipate that additional adjustments will be recorded in future periods.

March 18, 1996 The Nation. 13

ARTICLES

TROUBLED WHITEWATER:

THE DUAL ROLES OF KENNETH W. STARR

INVESTIGATIVE REPORT BY JOE CONASON AND MURRAY WAAS

A SPECIAL *NATION* INVESTIGATION HAS UNCOVERED a previously undisclosed conflict of interest involving special prosecutor Kenneth Starr and one of the leading players in the Whitewater drama that is the focus of his inquiry—the Resolution Trust Corporation. Confidential R.T.C. and court files obtained by *The Nation* show that from the beginning of his tenure as Whitewater special counsel, Starr has been operating with this critical conflict kept under wraps. Until January, Starr's own law firm—in which he remains a senior partner, and has acted on its management committee—was being sued for professional negligence by the R.T.C., a suit that ended with the signing of a secret agreement saving Starr's firm, by R.T.C. estimates, close to $700,000.

Throughout Starr's term as special counsel, neither he nor the two Republican-led Congressional committees looking into Whitewater have publicly acknowledged the circum-

stances or the compromising implications of Starr and his partners' being sued by the very agency whose officials and actions figure in the case he has been probing for the past nineteen months. Furthermore, the R.T.C. complaint against Kirkland & Ellis, Starr's firm, relates to work it did for a federally insured thrift that went bust in 1990—an eerie parallel to the failure of Madison Guaranty and counseling done for that S&L by Rose Law Firm partner Hillary Clinton, questions that lie at the heart of Whitewater. The R.T.C. action against Kirkland & Ellis was filed in May 1993, nearly a year before Starr's appointment as special counsel, and accused his firm of "aiding and abetting breaches of fiduciary responsibility" at a Colorado thrift, the First America Savings Bank.

A week before a court-ordered meeting between Starr's law firm and the R.T.C., the special prosecutor began investigating the agency.

Moreover, some of the same officials whose conduct Starr has been investigating were involved in the decision to sue his law firm. Indeed, one of Starr's first headline-making actions as special counsel was to probe the suspension of L. Jean Lewis, an R.T.C. senior investigator who initiated the Whitewater inquiry. But the very people Starr has been examining in the Lewis matter—including John Ryan, then the acting chief of the agency, and Ellen Kulka, its general counsel—were involved in decisions regarding the lawsuit against Kirkland & Ellis. The R.T.C. official who informed Lewis of her suspension in August 1994 was assistant general counsel Thomas Hindes, the same attorney who signed the memorandum approving the suit against Starr's firm.

R.T.C. officials say that while Starr's investigation of them may have had no material effect on the eventual agreement between the agency and Kirkland & Ellis, they had good reason to be intimidated: A week before a court-mandated settlement conference between the R.T.C. and the law firm, a federal grand jury convened by Starr began its investigation of the R.T.C.'s Whitewater activities. And the day before the settlement conference, Starr's office asked the R.T.C. to temporarily suspend its own internal investigation of Lewis's conduct.

The R.T.C.'s complex civil action against Kirkland & Ellis—which also named First America's officers, directors and outside accounting firm, Deloitte & Touche, as defendants—charged it with actively assisting a "deferred tax" transaction that resulted in the "unlawful transfer" of nearly a million dollars from First America to a holding company controlled by the bank's officers and directors. Although the funds were entered on the bank's ledger in 1988 as "income tax expense" and "deferred tax liability," they instead went into the pockets of First America's officers and directors, in the form of dividends and "consulting fees," according to the R.T.C.'s legal complaint. (Kirkland & Ellis, which served as First America's "primary outside counsel," was not implicated in any of the insider loans, diversions of funds or other questionable dealings engaged in by the bank's officers.)

This situation posed a stark legal and ethical problem for Starr, who suddenly was using the full prosecutorial powers accorded him as special counsel to investigate plaintiffs in a lawsuit against his own firm. In effect, Starr had put himself in a position to exercise the leverage of possible criminal sanctions against a group of federal officials who would decide whether and how the R.T.C.'s case against his Kirkland & Ellis partnership should be settled.

"It is a conflict both palpable and unacceptable for a part-time prosecutor to be investigating the conduct of public officials while those same officials are pursuing serious civil charges against the prosecutor's own law firm," says Stephen Gillers, professor of legal ethics at New York University. "Judge Starr is a prominent figure in American law, but the credibility of his investigation—already compromised by the circumstances surrounding his appointment as independent counsel, and by his decision to continue active practice while in office—is now further tarnished by the revelation of a conflicting interest that spans nearly his entire tenure."

This information and even the R.T.C. documents *The Nation* has brought to light were provided to Congress and have been kept from the public for several months, at the least. Senator Alfonse D'Amato and Representative Jim Leach, chairmen of the Congressional committees investigating Whitewater, have had the documents—as submitted to their panels—since last July, according to reliable sources on Capitol Hill. (Through a spokesman, Leach told *The Nation* that he has no knowledge of the facts or allegations involved, and considers Starr to be "an individual of impeccable integrity.")

Ironically, the three-judge federal appeals court panel that removed Robert Fiske as the first Whitewater special prosecutor and replaced him with Starr said it was necessary because independent counsels needed to be "protected against perceptions of conflict." The pretexts for the extraordinary removal of a special prosecutor, however, were rather obscure constructions of ethical conflict. In reality, the successful political pressure campaign that led to Fiske's ouster originated because his critics were dismayed he was not pursuing the Clintons more aggressively to determine their connection with the failure of the Madison Guaranty S&L, with possible influence over regulatory personnel and with other dealings they deemed suspicious.

The transactions that eventually led to the R.T.C. charges against Kirkland & Ellis began in 1987. That was when First America, already in financial trouble and under close scrutiny by the Federal Home Loan Bank Board, first sought federal approval to make cash payments of "deferred taxes" to National Savings Bancorporation of Colorado, its holding company. Despite the fact that such transfers were expressly prohibited by F.H.L.B.B. regulators, the "deferred tax" payments were transferred at the direction of John Hilliard, the president of First America. To justify his decision to ignore the bank regulators, Hilliard and his deputies asked their attorneys at Kirkland & Ellis to prepare a legal opinion about the payments and the accounting treatment.

In a July 1987 letter to Kirkland & Ellis attorney John Fitzgerald seeking the opinion, First America's assistant controller, Kerry Murdock, admitted that the transfers to National Savings would in

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fact not be used to pay taxes but instead would be spent for the benefit of the holding company's shareholders and directors.

The R.T.C. complaint in the First America case notes that "Kirkland & Ellis had actual knowledge that the purpose of the transfers of funds...was not to pay [First America's] 'deferred tax' liability, but to implement a scheme to transfer funds" for the benefit of Hilliard and certain shareholders and officers of both institutions.

By failing to advise Hilliard and Murdock that such payments should not be made, the R.T.C. charged, Kirkland & Ellis breached its professional duty to First America and the bank's other shareholders. The complaint goes on to suggest that the bank's lawyers intentionally lent legal cover to the scheme. "Rather than addressing what Fitzgerald knew to be the improper and illegal purpose of the payments," the R.T.C. alleged, the Kirkland & Ellis lawyer wrote an opinion that "narrowly focused" on the laws cited by the F.H.L.B.B. to forbid them. The result was that Hilliard and Murdock ignored the federal objections to the tax scheme and continued to transfer funds from the bank to the holding company, none of which were ever used to pay taxes.

When F.H.L.B.B. examiners inspected First America's books in June 1988, they discovered the illegal payments; in succeeding years, further examination of First America by federal authorities revealed a variety of other questionable dealings. After First America closed its doors in March 1990, it came under the jurisdiction of the Resolution Trust Corporation, created by Congress the year before to clean up the nationwide financial debacle caused by the failure of hundreds of savings and loans and other thrift institutions (including Madison Guaranty, the Arkansas S&L that was run by the Clintons' partners in the Whitewater Development Corporation). It took that agency three years to develop the court case that extended to implicate Starr's law partnership.

By then, the U.S. Attorney's office in Denver was also pursuing criminal charges against Hilliard and Murdock. The multicount indictment against Hilliard, which was tried in June 1993, included bank fraud, misapplication of funds and money laundering. Murdock pleaded guilty to misapplication of funds. Hilliard was convicted on twenty-four similar counts, but his conviction was overturned on appeal. Rather than face a retrial, the former bank president pleaded guilty four months later to two counts of misapplication of bank funds, one count of bank fraud and one count of making false entries in bank records.

Whitewater's Undertow

Robert Fiske, a partner at the New York law firm of Davis, Polk & Wardwell, was chosen as the first special counsel on Whitewater in 1994. Upon his appointment by Attorney General Janet Reno, Fiske severed all ties with his prestigious firm. Fiske's critics swiftly grew dissatisfied with the former federal prosecutor's investigation, however, and professed to see inherent conflicts between his background and his post. For example, he was scored because International Paper, a client of Davis, Polk, had once sold land to the Whitewater Development Corporation. Foremost among the critics was *The Wall Street Journal*, whose "mean-spirited and factually baseless" editorials about Whitewater were cited in a report by Fiske as an element in the suicide of White House counsel Vincent Foster.

The *Journal* became an unrelenting adversary of Fiske following his comments on Foster's death. Its editorial writers accused him of engaging in "political damage control" and "coverup," and scornfully cited his leave of absence from his law firm as "something other than resignation," pointing out that "Davis Polk is a sprawling firm with sprawling clients.... Seems to us there's a potential for conflict of interest with practically the whole world."

Under a renewed statute governing special counsels that had been signed into law after Fiske's appointment, power to name a special counsel passed from the Attorney General to a panel of three federal appeals judges. After a controversial luncheon between one of those judges, David Sentelle, and Senators Jesse Helms and Lauch Faircloth, both Republicans from Sentelle's home state of North Carolina, the judges removed Fiske and named Kenneth Starr as his replacement on August 5, 1994. (Helms, Faircloth and Sentelle denied that Whitewater was discussed at their lunch: even if true, as five former presidents of the American Bar Association noted, Sentelle violated his responsibility to uphold "the appearance of impartiality.") Sentelle and his colleagues cited conflict-of-interest problems as the reason for their unusual action. For his part, the new special counsel promised to be "absolutely fair and impartial."

The circumstances surrounding Starr's appointment were not the only subject of dispute as he took the reins from Fiske, however. The choice of Starr, a former Solicitor General in the Bush Administration, drew criticism because he was a highly partisan Republican who had donated and raised funds for G.O.P. Congressional candidates and had briefly flirted with running for the party's Senate nomination in Virginia only months before his appointment. Critics and supporters agreed that Starr—who came close to a Supreme Court nomination while working for Bush—is a highly ambitious attorney whose prospects would improve vastly under a future Republican administration.

To some observers, Starr's decision to stay active at his law partnership was just as worrisome as his extensive Republican ties. He declared his intention to continue drawing income from the firm, to remain on Kirkland & Ellis's management committee and to keep representing its clients. In order to deflect concerns about both his partisanship and his partnership, Starr brought in Samuel Dash, the Democratic attorney who had served as counsel to the Senate Watergate committee, as his outside ethics counsel. Clearly Starr hoped that the presence of Dash would quash any suggestion that he or his office might do anything improper, and would lend an appearance of concern about potential conflicts or prejudices. As conservative legal scholar Terry Eastland put it, "This is what the independent counsel law has always been about—appearances."

The first reported action taken by Starr after he replaced Fiske was to subpoena records from the R.T.C. regarding its treatment of L. Jean Lewis and two of her fellow investigators in the agency's Kansas City office who also had worked on the Whitewater matter. Only ten days after Starr's appointment, the three R.T.C. investigators had been placed on a two-week administrative leave by the agency's top officials as punishment for what was described as "noncompliance with R.T.C. policy and procedures." Lewis had, among other things, secretly taped a conversation with another R.T.C. official regarding Whitewater, and then provided that tape to Republicans in Congress, which was revealed at a public hearing. Upon learning of the suspensions, Republicans charged that Lewis and the others were being punished by Clinton appointees because they had vigorously pursued Whitewater leads and had provided information to those on the Hill who were also looking into Whitewater.

Within a week after the temporary R.T.C. action against Lewis and the others was announced, Starr requested that the Whitewater grand jury in Washington issue subpoenas to the R.T.C. for all documents relating to their suspension. The purpose of the subpoenas, according to newspaper reports at the time, was to determine whether R.T.C. or other federal officials had attempted to obstruct justice by intimidating Lewis and her colleagues.

That August 24, R.T.C. general counsel Ellen Kulka faxed a letter to Starr offering her agency's full cooperation with his efforts, including any matters involving the Kansas City office. "We are very willing to arrange that they respond to any request you make of them to provide information and to travel upon your request at R.T.C. expense to meet with you or your staff," Kulka wrote. She also offered to assign the three investigators to work with Starr. Kulka's letter was copied to acting R.T.C. chief John Ryan; the agency's deputy general counsel, Andrew Tomback; and its assistant general counsel, Thomas Hindes.

Nearly a year later, when Tomback testified before the House Banking Committee about the R.T.C.'s role in Whitewater, he said that Starr had never responded in writing to Kulka, although a telephone call was received from a Starr aide declining the help of Lewis and her colleagues. On August 9, 1995, Starr explained why: It was, he wrote, "for the sole reason that the administrative leave of these three employees was, and remains, under active investigation."

Avoiding the Spotlight

At the same time that Starr was beginning his review of the R.T.C. action against its Kansas City employees, the R.T.C.'s attorneys were considering how to proceed in their case against his law firm. A trial date had been scheduled for the next year, August 1995, and the government was in a strong position—thanks in part to the successful prosecutions of the two First America officials.

However, in early September 1994, a federal judge in Denver

ordered Kirkland & Ellis and the R.T.C. to enter into settlement negotiations over the First America case that September 28. In an internal R.T.C. memorandum analyzing the case against Kirkland & Ellis and dated September 7, 1994, agency attorneys predicted that a trial would probably lead to a judgment against the law firm of more than $1 million, including interest charges since the time of the original offense. That figure, the R.T.C. lawyers assumed, might be reduced by 30 percent—because of the greater culpability of the First America officials Hilliard and Murdock—to around $770,000. By computing the assumed probability of success in the suit at 70 percent, and subtracting another $240,000 in litigation expenses, the R.T.C. lawyers concluded that a minimum acceptable cash settlement from Kirkland & Ellis would be $300,000.

"We presently plan to start negotiations with a proposal starting at two or three times that amount," the September 7 memo said. At the same time, it noted, the R.T.C. was considering an additional claim of joint and several liability against Kirkland & Ellis, which could have increased the eventual judgment due from the law firm.

Yet no deal was reached at the September 28 conference between the sides. (Perhaps coincidentally, confidential documents show that the very day before the scheduled meeting, the R.T.C.'s inspector general informed its acting chief executive officer that Starr's office had just contacted the R.T.C. to request a temporary suspension of its investigation of Lewis so as not to interfere in the Starr probe.) Four months later, the settlement talks were still going nowhere, according to another R.T.C. memo dated January 9, 1995. "Recent attempts at negotiating a settlement in the case have failed," the memo to the R.T.C.'s deputy general counsel for litigation reported, "and, at this juncture, no prospects for settlement are expected. The case is set for trial sometime in the summer of 1995." But the case against Kirkland & Ellis never went to trial as scheduled.

Instead, the parties finally agreed to a settlement in late December 1995, which was signed by Kirkland & Ellis on January 2 of this year. For a payment of $325,000 from the law firm, the R.T.C. agreed to drop the charges and release Kirkland & Ellis from any liability involving the deferred tax payments. The settlement agreement includes a section in which Kirkland & Ellis asserts that it "expressly denies any wrongdoing."

But before the case was dismissed, there was another item of concern to Starr's law partners: secrecy. The penultimate clause of the agreement is a promise of confidentiality by the R.T.C., which says that except as required by law or court order, it "shall take no action, directly or indirectly, to initiate disclosure or public comment concerning this settlement...[and] that R.T.C. [would] exercise its best efforts to preserve the confidentiality of the information...by cooperating with [Kirkland & Ellis] to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the information...."

What is perhaps most startling about the story of Kenneth Starr, his law firm Kirkland & Ellis and their tangled relations with the Resolution Trust Corporation is that all of the above facts have been known to both the House and Senate committees investigating Whitewater since last summer at the latest. Requests for comment from Starr remain unanswered. For his part, Starr's ethics adviser Sam Dash, a Georgetown Law

Starr Constellation

The potential conflicts between Kenneth Starr's role as special counsel and his activities as a private attorney go well beyond the R.T.C.'s lawsuit against his firm. Last summer, Starr and his Kirkland & Ellis law partner Jay Lefkowitz were retained by the conservative Lynde and Harry Bradley Foundation to provide legal advice about the "school choice" issue and other matters as well. Later, the State of Wisconsin hired Starr and Kirkland & Ellis to defend the constitutionality of its school voucher program, which allows the public funding of religious schools. The Bradley Foundation, in turn, is reimbursing the State of Wisconsin for the services of Starr and Kirkland & Ellis.

Critics noted with dismay that the foundation, which distributes some $15 million in annual grants, has funded an array of right-wing periodicals and media that have been instrumental in promoting the most sinister theories about Whitewater. Among the recipients of Bradley largesse is the Landmark Legal Foundation, a litigious conservative nonprofit that has provided free legal representation to L. Jean Lewis, the R.T.C. official who brought Whitewater to light. (Landmark has represented Lewis in her extensive dealings with Starr and the independent counsel's office.) Landmark is also involved in the Wisconsin school voucher case, on the same side as Starr and the Bradley Foundation.

Currently, the voucher case is being considered by the Wisconsin Supreme Court. On February 27, Starr, representing the state, and Landmark general counsel Mark Bredemeier, representing private parties, made oral arguments before the court. Bredemeier says that he routinely consulted with Starr and other Kirkland & Ellis attorneys, though never during his discussions have he and the independent counsel "ever discussed Whitewater or Jean Lewis."

Starr's law partner Lefkowitz said in an interview that billing records show both he and Starr provided legal advice to the Bradley Foundation, but that their firm stopped representing Bradley after the foundation began reimbursing Wisconsin for Starr's work on the school voucher case.

Among the half-dozen conservative organizations and media that have promoted the Whitewater issue under Bradley support is *The American Spectator* ($340,000 in grants, according to tax records). Bradley has provided $3.2 million in grants to the Free Congress Foundation, which in turn pays the bills for National Empowerment Television, a right-wing cable network that is provided free to all cable companies in America. NET claims—whether true or not—that its drumbeat of Whitewater coverage caused the appointment of a special counsel. And Bradley has made at least $700,000 in grants to the Hudson Institute, a conservative think tank, which paid a former Bush Administration official to publish a study of the ethics of the Clintons (and who concluded, not surprisingly, that "Whitewater is metamorphosing into another Watergate"). J.C. AND M.W.

School professor, told *The Nation* that Starr did not bring up the potential of a conflict of interest with him until October or November of 1995, more than a full year after court-mandated settlement talks between the R.T.C. and Kirkland & Ellis, and the nearly simultaneous intensification of Starr's R.T.C. obstruction-of-justice probe. Dash said at that point he advised Starr it was not necessary to recuse himself from the R.T.C. investigation. Dash noted that Starr had not personally been involved in representation of the Colorado thrift, and that he had also removed himself from any role in negotiations with the R.T.C. to settle the agency's lawsuit against Kirkland & Ellis.

Dash conceded that Starr, if he were hearing a matter regarding the R.T.C. as a judge, would have to recuse himself under the Judicial Code of Ethics. But the same standards do not apply to federal prosecutors, he maintained, who have more discretionary leeway. "A prosecutor's actions are limited by the courts, criminal procedural rules, the Bill of Rights and by the tremendous public spotlight on their actions." This, of course, points up the utility of secrecy clauses such as the one written into the agreement between Kirkland & Ellis and the R.T.C. ■

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